

Pages 1 - 84

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

CHILDREN'S HEALTH DEFENSE, a )  
Georgia nonprofit organization, )

Plaintiff, )

VS. )

No. C 20-5787 SI

FACEBOOK, INC., a Delaware )  
corporation; MARK ZUCKERBERG, )  
a California resident; SCIENCE )  
FEEDBACK, a French corporation; )  
THE POYNTER INSTITUTE FOR MEDIA )  
STUDIES, INC., a Florida )  
corporation; and DOES 1-20, )

Defendants. )

San Francisco, California  
Wednesday, May 5, 2021

**TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR**

**APPEARANCES:** (via Zoom Webinar)

For Plaintiff:

**ROGER I. TEICH, ESQ.**  
290 Nevada Street  
San Francisco, California 94110

**JED RUBENFELD, ESQ.**  
1031 Forest Road  
New Haven, Connecticut 06515

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSR #5812, CRR, RMR  
Official Reporter - U.S. District Court

**APPEARANCES:** (via Zoom Webinar; continued)

For Defendants Facebook, Inc. and Mark Zuckerberg:

WILMER CUTLER PICKERING

HALE AND DORR LLP

2600 El Camino Real, Suite 400

Palo Alto, California 94306

**BY: SONAL N. MEHTA, ESQ.**

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Ave, NW

Washington, District of Columbia 20006

**BY: ARI HOLTZBLATT, ESQ.**

For Defendant The Poynter Institute for Media Studies, Inc.:

THOMAS & LOCICERO PL

601 South Boulevard

Tampa, Florida 33606

**BY: CAROL JEAN LOCICERO, ESQ.**

**MARK R. CARAMANICA, ESQ.**

Wednesday - May 5, 2021

10:32 a.m.

P R O C E E D I N G S

---000---

**THE CLERK:** Court is now in session. The Honorable Susan Illston presiding.

Now calling case number 20-CV-5787, Children's Health Defense versus Facebook, Incorporated.

Counsel, please state your appearances for the record, starting with plaintiff.

**MR. TEICH:** Roger Teich for plaintiff.

**THE COURT:** Good morning.

**MR. RUBENFELD:** And Jed Rubenfeld also for plaintiff. Good morning, Your Honor.

**THE COURT:** Say your name one more time, please.

**MR. RUBENFELD:** It's Jed Rubenfeld.

**THE COURT:** Rubenfeld. Thank you. Good morning.

**MR. RUBENFELD:** Good morning.

**MS. MEHTA:** Good morning, Your Honor. Sonal Mehta for defendants Facebook and Mr. Zuckerberg. With me is my partner Ari Holtzblatt. And we have Ian Chen, in-house counsel at Facebook, also listening on the public line.

**THE COURT:** Good morning.

**MS. LOCICERO:** Good morning, Your Honor. My name is Carol LoCicero, with Thomas and LoCicero, representing defendant Poynter Institute for Media Studies, Inc. And my

1 partner Mark Caramanica is also on.

2 **THE COURT:** Good morning.

3 Well, welcome to you all. We have on today defendants' --  
4 each defendant has moved to dismiss the Second Amended  
5 Complaint filed by the plaintiffs. There are three causes of  
6 action in the complaint: the *Bivens* claim; the Lanham Act  
7 claim; and the civil RICO claim.

8 Have you spoken with each other about how you'd like to  
9 divvy up your time? We have two hours total. You have two  
10 hours, an hour each. So what's your plan?

11 **MS. MEHTA:** Good morning, Your Honor.

12 **THE COURT:** Or is there a plan?

13 **MR. TEICH:** The plan, I think, is to receive a plan  
14 from you. But in the absence --

15 **THE COURT:** Okay. In the absence of anything from you  
16 folks, I will tell you there are three claims. It seems to me  
17 it would make sense to argue the first claim back and forth and  
18 then the second claim back and forth, and the third claim back  
19 and forth.

20 I leave it up to you how to allocate your time on those  
21 three claims. I just know that we have two hours; we've got to  
22 get done. So I would suggest that we do it in that way.

23 Does that make sense?

24 **MR. TEICH:** Yes, Your Honor. This is Roger Teich for  
25 plaintiff. How and in what sequence would you like to hear

1 argument on the Rule 15(d) motion to supplement?

2 **THE COURT:** We can do that at the end. I don't know  
3 if we'll need argument, but it seems to me that it blends in  
4 actually a lot -- the issue is going to be futility, I think,  
5 of the amendment, and that goes probably as much to the causes  
6 of action as anything else --

7 **MR. TEICH:** Sure.

8 **THE COURT:** -- so I'm not concerned about that.

9 **MR. TEICH:** Okay.

10 **THE COURT:** Okay. So it's defendants' motions.

11 **MS. MEHTA:** Yes, Your Honor. Thank you.

12 I'll start by addressing the motion on behalf of  
13 defendants Facebook and Mr. Zuckerberg, and then the counsel  
14 for Poynter may have some additional comments on the issues  
15 that are specific to Poynter.

16 And as Your Honor just suggested, we'd like to start with  
17 the *Bivens* claim, which is Count One; and then I'll pass it to  
18 my colleague, Mr. Holtzblatt, who can address Counts Two and  
19 Three after we ping-pong back and forth.

20 **THE COURT:** That's fine. Just remember that your  
21 side, which includes both defendants; can talk for an hour,  
22 their side can talk for an hour. So keep track of that.

23 **MS. MEHTA:** Understood, Your Honor. And I think we  
24 can be very efficient with your time here, Your Honor.

25 I want to start first by focusing in on the task at hand.

1 I think a lot of the briefing and a lot of the pleadings  
2 attempt to raise issues that are really collateral to the  
3 issues that are before the Court.

4 We're not here today to talk about extremely highly  
5 politicized and controversial issues around vaccine science or  
6 around misinformation generally. I want to focus the Court's  
7 attention and take our time today talking about the specific  
8 allegations in the complaint and whether they have been  
9 adequately pled.

10 With the -- with respect to the *Bivens* claim, there are  
11 multiple independent reasons why the *Bivens* claim should be  
12 rejected and should be rejected with prejudice based on the  
13 pleading, which we now have, you know, at least three  
14 pleadings, and, with the supplement, four attempts to plead a  
15 *Bivens* claim. And there are multiple threshold defects with  
16 the *Bivens* claim that should independently support dismissal  
17 with prejudice of the *Bivens* claim.

18 The first defect is that Facebook, as an entity, cannot be  
19 liable under *Bivens* because it is not an individual federal  
20 actor. And we would cite Your Honor to the *Correctional*  
21 *Services versus Malesko* case from the Supreme Court on that in  
22 2001.

23 That case foreclosed inferring constitutional tort  
24 liability against a private entity, and it explained that the  
25 basis for *Bivens* liability is trying to correct the behavior of

1 an individual federal officer.

2           **THE COURT:** Why don't we jump ahead. I agree with you  
3 on that. So you don't need to argue that further.

4           **MS. MEHTA:** Okay.

5           **THE COURT:** What about Mr. Zuckerberg though?

6           **MS. MEHTA:** And then with respect to Mr. Zuckerberg,  
7 Mr. Zuckerberg has, at best, been alleged to be the CEO of the  
8 company who sets policy for the company.

9           There is no allegation that is plausible on the Second  
10 Amended Complaint that Mr. Zuckerberg was personally involved  
11 in or directed the actual challenged acts here which are the  
12 acts relating to CHD's post.

13           There is no allegation nor could there be any plausible  
14 allegation that Mr. Zuckerberg was involved in labeling posts,  
15 taking down posts, anything relating to CHD's post, which is  
16 the challenged conduct at issue here.

17           So even if we were to read their allegations and take them  
18 as true for purposes of this motion, which we have to, even  
19 though we don't agree with them, what they've argued, at best,  
20 is that, as the CEO, he's a hands-on CEO that is involved in  
21 setting policy for the company. That is not sufficient to  
22 create liability for him as an individual.

23           And this is independent of all the other problems with the  
24 *Bivens* theory, but just right out of the gate Mr. Zuckerberg  
25 hasn't been challenged as an individual for actually taking any

1 of the challenged acts. And that precludes *Bivens* liability  
2 for him as an individual, independent of all the other problems  
3 with the *Bivens* theory.

4 Unless Your Honor has any questions on that, I want to go  
5 to point two, which is, second point, independent of that,  
6 there's also a fundamental problem with the *Bivens* theory,  
7 which is the attempt to create private liability under the  
8 First Amendment.

9 I would point Your Honor to Judge DeMarchi's case --  
10 opinion in the *Daniels* case, which we submitted as supplemental  
11 authority, because Judge DeMarchi was addressing incredibly  
12 similar allegations, allegations relating to the same set of  
13 letters from Representative Adam Schiff to the CEOs of the  
14 technology companies relating to these vaccine misinformation  
15 questions.

16 And in that case she noted that it's far from clear that  
17 under the Ninth Circuit precedent there can be any kind of  
18 First Amendment liability for a private actor at all. And she  
19 cited the *Vega* case for that.

20 But even apart from that, the second defect with the  
21 theory is that this would expand -- CHD's allegations here as  
22 to Mr. Zuckerberg or as to Facebook would fundamentally expand  
23 *Bivens* liability into a new context because this would hold a  
24 private actor liable for alleged First Amendment violations.  
25 And that is precisely what the Supreme Court and the Ninth



1 Circuit have both repeatedly cautioned is disfavored and has to  
2 be undertaken with great care and only under very narrow  
3 circumstances that don't resemble the claims here.

4 **THE COURT:** Well, they have a Fifth Amendment claim.

5 **MS. MEHTA:** Yes, Your Honor. But even with respect to  
6 the Fifth Amendment claim, that goes to the third defect,  
7 actually, in their *Bivens* theory, which I'm happy to address  
8 now --

9 **THE COURT:** Oh, okay. All right.

10 **MS. MEHTA:** -- which is the lack of state action.  
11 Right --

12 **THE COURT:** As long as you're coming -- as long as  
13 you're coming to it, fine.

14 **MS. MEHTA:** I absolutely am, and it's a perfect time  
15 to get to it.

16 So the third problem -- all of these are independent  
17 problems with the theory. The third problem with the theory is  
18 that there is no viable claim of state action in this  
19 particular case. And there's multiple reasons for that, and  
20 I'll quickly go through each of them.

21 The first is, if we look at the allegation, they don't  
22 state any plausible inference of state action with respect to  
23 the challenged conduct. So if you look at all of the facts  
24 that they've pled -- the Schiff letters, the Representative  
25 Schiff letters, the alleged partnership or information between

1 the CDC and Facebook -- none of that is actually specifically  
2 tied to the actual challenged conduct here. And that, itself,  
3 precludes any finding of state action independently.

4 That alone would be dispositive of the state action  
5 question. There's just nothing here that actually connects any  
6 of the facts that they've pled to the actual CHD posts that  
7 were labeled and that are challenged at issue here.

8 That's the first point -- or the first sub point, I should  
9 say.

10 Then there's a second sub point, which is, if we look at  
11 their actual legal theory as the state action, there's a bunch  
12 of different flaws with that legal theory as a state action.

13 They cite to three different theories for how there could  
14 be state action in this case. The first is joint action.

15 On joint action, again, I would point Your Honor to Judge  
16 DeMarchi's opinion in *Daniels*, where she addresses this point  
17 and makes clear precisely why the kinds of allegations we're  
18 talking about are insufficient.

19 There's just no plausible allegation that a letter from  
20 Representative Schiff or some sort of alleged partnership with  
21 the CDC would give rise to a joint action theory.

22 And she was addressing the same letters from  
23 Representative Schiff in *Daniels* and addressed them and said  
24 that's not sufficient to create joint action. And, of course,  
25 even if it were, they don't relate to the alleged -- the

1 challenged activity.

2       There's nothing in those letters, there's nothing in any  
3 of the allegations that connects any of the supposed joint  
4 actions to the actual challenged activity. And under the  
5 *Gorenc* case, which we cite -- G-O-R-E-N-C -- which we cite in  
6 our briefing, that alone is insufficient because in order to  
7 have state action there has to be joint participation in the  
8 challenged activity.

9       The second reason, independently, that the state action  
10 theory doesn't work or the joint -- the joint action theory  
11 doesn't work is, even if we were to look at the points that are  
12 in the supplement -- and this goes to the futility of the  
13 supplement, even if you were to look at the points in the  
14 supplement, none of those change the fundamental facts that the  
15 challenged activity is in no way pled to be connected to the  
16 state action.

17       So even if we were to look at that, looking at futility,  
18 looking at all of the new allegations, they just don't connect  
19 back to the actual challenged activity, and they would fail  
20 under that.

21       I want to also address a second point, the coercion theory  
22 that's been articulated by the plaintiffs.

23       With respect to the coercion theory, again, this is  
24 something that Judge DeMarchi addressed in the context of the  
25 Representative Schiff letters. And she rejected the theory --

1 and we would respectfully submit that Your Honor should also  
2 reject it -- because, again, at the gate, they don't tie back  
3 to the actual challenged activity and that, itself, precludes  
4 any finding of coercion.

5 But even beyond that, the letters that were being  
6 challenged, the Representative Schiff letters, they suggest, as  
7 Judge DeMarchi found -- and as Judge Contreras found in the  
8 District of D.C. when he was actually addressing a case  
9 involving the same letters, a case against Mr. Schiff -- what  
10 he found was these are information-gathering letters. And what  
11 they do is they suggest that there is Congressional interest in  
12 a problem.

13 And under the Ninth Circuit holding in *Mathis versus PG&E*,  
14 which is 75 F.3d 498 at 503, that is insufficient to create  
15 state action under a coercion theory. Congressional interest  
16 in solving a problem is not coercion. And that is, at best,  
17 what they've pointed to here with respect to that.

18 And then even aside from the pleading insufficiencies,  
19 there's also the legal problem, which is under the *Sutton* case,  
20 from the Ninth Circuit -- that's 192 F.3d 826 at 843 -- a truly  
21 private entity cannot be liable solely because it is compelled  
22 to act by the government.

23 So even if you set aside the pleading defects, we just  
24 look at the legal theories, the coercion theory doesn't work  
25 because of the Ninth Circuit's precedent in *Sutton*.

1       The final theory on state action I want to quickly address  
2 is encouragement, which is the theory that CHD has pled -- I  
3 would give them credit for being creative here, although it's  
4 been pled by others as well, so they're not the only one.

5       This is a theory that's been pled that suggests that  
6 somehow the combination of CDA 230 and the other acts, the  
7 Representative Schiff letters, somehow that combination of  
8 activity creates encouragement of the violative conduct that  
9 would somehow give rise to a First Amendment violation. And  
10 that theory, again, has to be rejected out of the gate for a  
11 whole host of reasons.

12       Judge DeMarchi also happened to address this in a  
13 different case, which is the *Divino Group versus Google* case,  
14 which is 2021 WL 51715 at star 6. This is from January, in  
15 which, again, these were letters from Representative Schiff,  
16 and the theory was, well, Section 230 creates some sort of  
17 encouragement on the part of the government that transforms  
18 otherwise private conduct into government conduct.

19       She rejected that theory for exactly the same reasons that  
20 Your Honor should reject them here. First of all, nothing in  
21 Section 230 in any way is connected to the specific actions  
22 here. In other words if we look at CDA 230 in the face of the  
23 statute, it doesn't direct the particular conduct at issue, the  
24 particular challenged conduct. It is on its face a neutral  
25 statute.

1 And she goes into that in the *Divino Group* case and  
2 explains why that is the case and why that precludes the sort  
3 of *Skinner*-type theory that we have from CHD here. So that  
4 itself would be a basis to reject that theory.

5 The other thing was, even if Your Honor were to get past  
6 that, the problem with the theory is that it improperly  
7 attempts to convert this permissive law into something beyond  
8 that. And I think that's based on a fundamental misreading of  
9 the *Skinner* case and of the *Hanson* case and the other cases  
10 that are cited by CHD.

11 Judge DeMarchi explains why in the opinion, but the bottom  
12 line is it is a permissive law, and that permissive law itself  
13 cannot give rise to this kind of encouragement or coercion  
14 theory.

15 And when you add to it a letter of inquiry from a single  
16 representative, or even individual letters from multiple  
17 representatives of the House of Representatives, that doesn't  
18 in any way constitute a threat, coercion, encouragement, let  
19 alone something that could take a neutral permissive statute  
20 and convert it into the kind of statute that, on very rare  
21 occasions, has been found to support this kind of a theory.

22 So I know I've got gone through a lot of different reasons  
23 why the *Bivens* claim doesn't work, but I think the reason for  
24 that is the *Bivens* claim is just fundamentally a mismatch with  
25 the allegations in this case.

1           And I think one thing that is -- I think is really  
2           important not to lose sight of, that we're going to talk about  
3           when we get to the rest of the argument, is that not only are  
4           there all these pleading defects and all these legal defects  
5           with the theory, but the theory itself creates really  
6           substantial First Amendment concerns on Facebook -- on the part  
7           of Facebook and the platforms. And that's why the case law has  
8           always cautioned that we take great care in extending *Bivens*  
9           liability.

10           And here Your Honor would have to go through multiple  
11           extensions of *Bivens* liability in order to find that the theory  
12           that has been pled actually plausibly states a claim or that  
13           they could ever plausibly state a claim under *Bivens*.

14           You would have to find that -- each of the different areas  
15           where I said there was an independent problem, you would have  
16           to expand *Bivens* liability in so many different ways. And the  
17           reason that the cases tell us that we don't do that is  
18           precisely because we have to balance the other First Amendment  
19           concerns that are at issue here, which are the First Amendment  
20           concerns of Facebook and the platform.

21           Unless Your Honor has any other questions on *Bivens*, I  
22           will stop there and reserve the time for the other issues.

23           **THE COURT:** Okay. Does the other defendant, Poynter,  
24           want to be heard on *Bivens*, or just Facebook?

25           **MS. LOCICERO:** Just briefly, Your Honor, for Poynter.

1           **THE COURT:** Okay.

2           **MS. LOCICERO:** Your Honor, I want to point out the  
3 facts that Face- -- I'm sorry -- CHD alleges specifically  
4 related to Poynter because they're very thin on the *Bivens*, and  
5 all the counts, frankly, and important for the Court to  
6 understand with respect to analyzing the *Bivens* claim as it  
7 relates to Poynter.

8           Poynter is a journalism institution. I won't belabor  
9 *Malesko* because the Court has already expressed understanding  
10 of the *Malesko* decision, of course. And it's clear from the  
11 complaint, just in paragraph 21, that Poynter, too, is a  
12 private corporate defendant. It's a nonprofit Florida entity.  
13 And *Malesko* prohibits suing Poynter.

14           But what's important in this case to understand is that,  
15 with respect to Poynter, Poynter, through its brand PolitiFact,  
16 is providing fact-checking journalistic services on the  
17 Facebook platform.

18           What is at issue here with respect to CHD's allegations is  
19 primarily about a fact check that Poynter did that actually  
20 involves a third party, that's not a party to this litigation,  
21 called Collective Evolution.

22           And Collective Evolution wrote an article that CHD later  
23 shares that connects a U.S. Armed Forces study about the flu  
24 vaccine to whether there are higher incidents of Corona virus  
25 in individuals getting that vaccine. The PolitiFact service



1 rated that headline as false.

2 If the Court takes a look at DE 654, which is Exhibit B to  
3 the Second Amended Complaint, the Collective Evolution  
4 article -- which I'll point out has a corrected headline  
5 because they apparently agreed with Poynter's criticism -- it  
6 also contains a full-blown fact check, which is essentially an  
7 11-paragraph news article about why Poynter and PolitiFact had  
8 concerns about the Collective Evolution headline.

9 CHD may have shared the Collective Evolution article, CHD  
10 may not like the journalism about the Collective Evolution  
11 article, but the speech was about that article.

12 The only other allegations in the *Bivens* claim that seem  
13 to relate to Poynter and the federal government would involve  
14 funding. And Poynter discloses -- it's no secret -- that there  
15 is some direct and indirect government funding to Poynter as a  
16 nonprofit that, I believe, CHD alleges it's about 10 percent of  
17 Poynter's funding.

18 But those are really the facts that CHD attempts to allege  
19 to state a *Bivens* claim against Poynter.

20 In addition to the *Malesko* problems that the *Bivens* claim  
21 has, there's a fundamental claim with federal action related to  
22 Poynter. The only allegation that directly relates to Poynter  
23 in federal action has to do with the funding that I mentioned.

24 And I wanted to point out the *Morse versus North Coast*  
25 *Opportunities* case, 118 F.3d at 1338, in which the Ninth

1 Circuit analyzed a First Amendment retaliation *Bivens* claim  
2 that involved an employee that wasn't rehired by a Head Start  
3 Program.

4 And the claims in that case involved almost exclusive --  
5 the Head Start Program was almost exclusively federally funded;  
6 it was heavily regulated through federal regulations. And even  
7 in that situation, where you've got virtually all funding  
8 coming from the federal government and extensive regulations  
9 coming from the federal government, there wasn't sufficient  
10 action -- federal action for a *Bivens* claim.

11 Here you have way, way less than that. And I know that  
12 Facebook sort of foreshadowed arguing the First Amendment  
13 issues, but I want to point out here that what we're  
14 fundamentally talking about is journalism by Poynter through  
15 its PolitiFact fact-checking service.

16 And, essentially, what the plaintiffs are asking you to do  
17 here is to censor Poynter's journalism. And that's a  
18 fundamental problem under the First Amendment as it relates to  
19 Poynter and the *Bivens* claim.

20 So we also ask that the Court dismiss the *Bivens* claim  
21 with prejudice. Thank you, Your Honor.

22 **THE COURT:** Okay. Thank you.

23 Does -- do the plaintiffs wish to respond?

24 **MR. TEICH:** Yes, please, Your Honor. Roger Teich for  
25 plaintiff.

1 And I'm going to say some things on the joint action  
2 theory and then turn it over to my colleague, Jed Rubenfeld, to  
3 discuss compulsion and the other theories.

4 **THE COURT:** Okay.

5 **MR. TEICH:** And I do want to say at the outset, there  
6 is a fourth cause of action for declaratory injunctive relief,  
7 and that is going to play in later.

8 **THE COURT:** Okay.

9 **MR. TEICH:** I'm sure the Court's aware of that.

10 Let me start by saying that plaintiff, Children's Health  
11 Defense, publishes facts, data, and opinions that are critical  
12 of the CDC, an executive agency, but none of those things --  
13 none of the facts, data, or opinions are false.

14 But they are critical, highly critical of the CDC. And  
15 that may make CHD, Children's Health Defense, unpopular, but  
16 that's the core value the First Amendment protects and never  
17 more urgently than now, Your Honor.

18 In 2019, the CDC, the Center for Disease Control and  
19 Prevention, unveiled what it called its *Vaccinate with*  
20 *Confidence* strategic initiative. And this is outlined in  
21 paragraph 50 of our Second Amended Complaint. And I think it's  
22 a terribly important paragraph.

23 **THE COURT:** You're going to get to joint action?

24 **MR. TEICH:** Yes, I am. This is the joint action.

25 The CDC initiative identified as its high priority to,

1 quote, stop myths and misinformation. The term  
2 "misinformation" is the euphemism they used, incredibly, for  
3 any statement that conflicts with their own policy regardless  
4 of its truth.

5 It reminds us of Humpty-Dumpty's line: The word means  
6 just what I choose it to mean, nothing more nor less.

7 And that term "misinformation" we will use today, but bear  
8 in mind, in our allegations it is a euphemism for speech that's  
9 critical of the CDC. It is not -- that word is being misused  
10 by the CDC, and they are directing Facebook to use it in that  
11 same way.

12 The CDC said publicly -- and it's in paragraph 50 of our  
13 complaint -- that it was engaging partners, that's a quote,  
14 using trusted messengers, working with and collaborating with  
15 Facebook to contain the spread of, quote --

16 **THE COURT:** It didn't say Facebook, it said messengers  
17 and partners; right?

18 **MR. TEICH:** It said trusted messengers and partners.  
19 And I believe they do identify Facebook as a partner. Both the  
20 CDC Foundation does and I believe the CDC does.

21 And collaborating with them to, quote, contain the spread  
22 of misinformation on social media. That's public record.

23 And, you know, in preparing for this I did a string of  
24 analogies. "Jointly conceived" is the legal standard for joint  
25 action. "Engaging partners" is the term they used. "Working

1 with" is the phrase they used. "Acting in concert," the legal  
2 standard. "Using trusted messengers," encourage or direct by  
3 an informal policy; somehow reach an understanding.

4 The CDC's statements quoted to you in paragraph 50 are the  
5 same as *Adickes*, *Brentwood*, *Mathis*, the legal standard for  
6 making out joint action. But that's just the tip of the  
7 iceberg.

8 There's the reading between the lines, the reasonable  
9 inferences and common sense that you can use to infer collusion  
10 from timing and *cui bono*. Who benefits? The CDC has reaped  
11 enormous benefits from this.

12 And we submit there's a triable issue of shared intent  
13 between Facebook and the Executive Branch through the CDC to  
14 suppress Children's Health Defense's speech and a triable issue  
15 as to when it was formed and how it was made manifest in  
16 actions directed against CHD.

17 I want to talk later about the timing issue because  
18 paragraph 50 is sourced to October 2019. The adverse actions  
19 are in May, with the defunding of the button, the *Donate*  
20 button, June and ongoing through the present day on the fact  
21 checks, and September of 2019 for the first publication of the  
22 warning label on CHD's page.

23 And you might say, well, all of those are adverse actions,  
24 but the CDC's strategic initiative postdates them. But I don't  
25 believe that's right, Your Honor, because the terms they use --

1 "engaging with," "using trusted messengers," "working with  
2 Facebook," "collaborating with Facebook" -- they're all past  
3 actions, uncompleted. They're imperfect, I think is the  
4 grammatical term for it.

5 They reference past action undertaken but not completed at  
6 the time of the initiative, and conclude, on the face of that,  
7 that that initiative only sprang into existence in October. It  
8 didn't. I would submit it goes back at least as far as January  
9 of 2019 and predates and encompasses the period in which  
10 Facebook has taken these adverse actions.

11 The exigency here -- and the law must always meet the  
12 exigency of the day, Your Honor. The exigency here is CDC's  
13 underhandedness in appointing Facebook not just as its  
14 propagandist but as its censor. That's what *Bivens* was aimed  
15 at, the greater capacity for harm from actors acting as federal  
16 actors.

17 And, you know, *Bivens* cites *Marbury*, and that's no  
18 accident. I think here, too, you're dealing with first  
19 principles.

20 **THE COURT:** So you're arguing that the CDC has  
21 appointed Facebook as a propagandist and a censor?

22 **MR. TEICH:** Correct.

23 Now, there is a role for affirmative government speech. I  
24 can call it propaganda, but, you know, that's a label. But,  
25 you know, appointing them as censor to demote, fact check,

1 censor, defund, all of those functions, that crosses a  
2 constitutional line.

3 And the issue for you now, which is consequential, is will  
4 we be permitted the discovery to show evidence that they did  
5 reach an understanding, that there is an agreement?

6 **THE COURT:** Oh, so you want to allege it and then find  
7 facts afterwards?

8 **MR. TEICH:** No, not at all, Your Honor. It is in the  
9 public record that they are working with, that they have  
10 reached an agreement to dip into the -- I mean, Mark Zuckerberg  
11 says that he's working with, you know, the CDC and the World  
12 Health Organization to remove vaccine misinformation.

13 He has said that, and that's in the Second Amended  
14 Complaint. That's at paragraph 52 of the Second Amended  
15 Complaint. He has said that Facebook works with both agencies  
16 to remove misinformation. It seems to me that is a  
17 plausible -- highly plausible allegation of an agreement.

18 And, dipping into the supplement, we allege that the Biden  
19 Administration says it is, quote, directly engaging with  
20 Facebook to, quote, clamp down on vaccine misinformation. And  
21 Facebook says it has reached out to the White House to offer  
22 any assistance it can provide.

23 That's more than merely furnishing the government with  
24 information. That's a plausible case that there is an  
25 agreement.

1 Again, I do want to say that I think an inference -- a  
2 reasonable inference is that these things Facebook has done are  
3 unlikely to be undertaken without an agreement; that they  
4 benefit the CDC so directly, the warning label redirects users  
5 to the CDC for, quote, reliable, up-to-date information.

6 The fact checks refer users to the CDC as, quote,  
7 authoritative. That's probably why CHD is still on Facebook at  
8 all. Facebook is helping the CDC, the government agency,  
9 preach to the unconverted on CHD's page.

10 CDC, the government agency, benefits so directly that it's  
11 reasonable to infer they are involved with Facebook in a shared  
12 objective, a shared design, and means.

13 **THE COURT:** "CDC benefits so directly"? What do you  
14 mean by that?

15 **MR. TEICH:** What I mean by that is from warning labels  
16 that refer -- that are on -- that are on CHD's page, Children's  
17 Health Defense's page, the warning label says "The CDC has  
18 reliable up-to-date information. Go to cdc.gov," with a  
19 button.

20 **THE COURT:** That benefits CDC how exactly?

21 **MR. TEICH:** It's referring Facebook users who are  
22 visitors to Children's Health Defense fund's page. It refers  
23 them -- it's a form of advertising for the CDC. It's saying  
24 they're reliable, they're up-to-date, go there now.

25 **THE COURT:** And that benefits CDC how again?



1           **MR. TEICH:** It directs traffic to the CDC.

2           **THE COURT:** Does that make money for CDC?

3           **MR. TEICH:** It's more that it rechannels traffic there  
4 from a group who has been highly critical of the CDC on their  
5 page. In the prime real estate at the top of their page, it  
6 says, essentially, what you're looking at below, this warning  
7 label, is unreliable and out of date; and if you want the  
8 truth, quote-unquote, go to the Centers for Disease Control. I  
9 would say that does benefit them.

10          **THE COURT:** Does it say that? Does it say "truth"?

11          **MR. TEICH:** Well, it says "reliable and up-to-date."  
12 I think those are synonyms for -- I mean, one of the issues  
13 that you'll need to confront is the core allegation that the  
14 CDC, the government agency, has put forth the standards of  
15 decision by which Facebook judges Children's Health Defense's  
16 content.

17          And I would say to you that in Docket 69-4, attached to  
18 their motion, is material Facebook put forth on how they handle  
19 misinformation. They say openly, Facebook, that the CDC --  
20 that the CDC is doing this, is setting the standard. They say,  
21 quote, We defer to the CDC, slash, WHO for authoritative  
22 judgments.

23          Now, they have lampooned our claim as a conspiracy theory.  
24 It's not a conspiracy theory, but conspiracy law has a lot to  
25 say about the interpretive rules here.

1 First, it's nearly always necessary to infer that two  
2 parties, here the government agency, the CDC, and Facebook,  
3 have acted in concert. Almost always necessary to infer that  
4 from circumstantial evidence.

5 It's not that we're seeking discovery in search of our  
6 case, but it's very unusual to have as much of an agreement,  
7 explicit, as we have here, but we believe that the censorship  
8 is alluded to euphemistically but not spelled out.

9 But the existence or nonexistence of a conspiracy is  
10 essentially a factual issue that the jury should decide.  
11 That's *Adickes*, Justice Black's concurrence; and that's the  
12 Earth First! case, *Mendocino Environmental Center*, from the  
13 Ninth Circuit.

14 The other principle of conspiracy law that I think speaks  
15 to this situation is that the participants in a conspiracy must  
16 share the general objective, but they don't need to know all  
17 the details of the plan or possess the same motives.

18 Here, Facebook has huge profit motives to censor  
19 plaintiff. What's --

20 **THE COURT:** And that is what?

21 **MR. TEICH:** Well, both their interest in diverting  
22 Children's Health Defense users to their affiliated nonprofits,  
23 the fact-checkers.

24 And it's also the adverse profit motives that are in the  
25 Second Amended Complaint: vaccine development that Mark

1     Zuckerberg is heavily invested in; brand protection for their  
2     pharmaceutical company advertisers, it's a billion-dollar  
3     income stream a year; and 5G development, of which CHD,  
4     plaintiff, has been critical.

5             So I can march through the timeline, but, as I said,  
6     paragraphs 50, 51 about the CDC's 2019 *Vaccinate with*  
7     *Confidence* initiative, we think is a significant marker, public  
8     record marker, of ongoing cooperation and joint action with the  
9     CDC.

10            We allege that the CDC, the government agency, deputized  
11     the World Health Organization as its proxy. And the same day  
12     that the warning label was published, Facebook published on  
13     CHD's page, the World Health Organization issued a press  
14     release saying they had been in discussion with Facebook, with  
15     Facebook, for several months to reduce the spread of  
16     inaccuracies on Facebook.

17            And we allege that they are acting in this regard as a  
18     proxy for the CDC under their charter. As is alleged in the  
19     complaint, the World Health Organization needs the express  
20     consent of a U.S. Governmental entity for the World Health  
21     Organization to cooperate with a domestic corporation. And we  
22     allege that they have done so here with the express consent of  
23     the CDC.

24            So we feel like that's part of the mix you should consider  
25     in determining that we have plausibly alleged a theory of joint

1 action.

2 Your Honor, I think with that, that -- I would say *Mathis*,  
3 we feel, is a case that strongly supports this joint action  
4 theory. The crucial question in *Mathis* -- I mean, I would say  
5 Facebook is not using -- to back up a step -- its own  
6 independent medical judgment or its own legal judgment, as in  
7 *Polk County* or *Rendell-Baker*. They're deferring to the CDC,  
8 the government agency, for the judgment. They both emphasize  
9 their cooperative relationship in approaching these issues.

10 And similar to *Mathis*, the CDC is not shrinking from  
11 suggesting a standard of decision for the exclusion of speech  
12 from Facebook's platform.

13 And the crucial question, as in *Mathis*, is whether the  
14 government provides that standard of decision -- vaccine  
15 misinformation circularly defined as any speech that's critical  
16 of the CDC -- regardless of its truth. That is the standard  
17 that Facebook has -- the mantle that they have taken to do what  
18 they're doing to censor speech.

19 Under *Mathis*, the crucial question is not that the  
20 government specifies particular individuals subject to the  
21 rule. In *Mathis*, the particular plaintiff who is denied the  
22 security clearance didn't allege that the -- you know, that the  
23 nuclear regulatory had him, in particular, on its radar.

24 Here I would suggest to you, given the prominence of  
25 Mr. Kennedy and of Children's Health Defense in this scientific

1 dispute, I think it is plausible that they have been identified  
2 by the CDC.

3 But under *Mathis*, the issue is more is the CDC  
4 cooperating, directly engaging, working with trusted  
5 messengers, which it considers Facebook to be.

6 I think, with that, I would like to turn it over to Jed  
7 Rubenfeld to discuss some other aspects of state action.

8 **THE COURT:** Thank you.

9 **MR. TEICH:** Thank you.

10 **THE COURT:** Mr. Rubenfeld.

11 **MR. RUBENFELD:** Thank you, Your Honor. I'm just  
12 trying to --

13 **THE COURT:** There.

14 **MR. RUBENFELD:** There.

15 Good afternoon, Your Honor. Good morning, I guess, on the  
16 West Coast. Thank you so much for devoting so much of your  
17 time to the --

18 **THE COURT:** Mr. Rubenfeld, there's a sign on you that  
19 says your network bandwidth is low. And, actually, your voice  
20 is cutting in and out.

21 (Discussion held off the record.)

22 **MR. RUBENFELD:** Let me just ask you whether -- I'm so  
23 sorry to be causing so many problems. Is that any better? Can  
24 you not hear me?

25 **THE COURT:** It's a little better, but it still cuts in

1 and out. It's the court reporter we're concerned about, so --

2 **MR. RUBENFELD:** Oh, this is a disaster.

3 **THE COURT:** It's not a disaster. It's fine.

4 Is there a way to cut off the vision part and just go with  
5 the sound? Would that be better?

6 (Discussion held off the record.)

7 **THE COURT:** If there's some way just to get on the  
8 phone?

9 **MR. RUBENFELD:** Let me ask you, though, I have tried  
10 to move my --

11 **THE COURT:** No.

12 **MR. RUBENFELD:** Why not? Can I not do that?

13 **THE COURT:** Can you -- it's still cutting out. Can  
14 you get on the phone?

15 **MR. RUBENFELD:** So you're still having trouble hearing  
16 me; is that right?

17 **THE COURT:** Right then it's good.

18 **MR. RUBENFELD:** I can get on the phone if I --

19 **THE COURT:** Okay. You're good now. What you're doing  
20 now is working.

21 **MR. RUBENFELD:** I'm good now?

22 **THE COURT:** Yeah.

23 **MR. RUBENFELD:** Let me go ahead and try to start, and  
24 I'm sure I'll be told if things are going haywire.

25 So, yes. Thank you, Your Honor.

1           And let me begin by very briefly taking a step back and  
2           broadening the lens, if I might, because this case, Your Honor,  
3           from a free speech point of view and the present moment in the  
4           United States, are genuinely unprecedented.

5           Today two or three companies, including Facebook, private  
6           companies, private behemoth companies, act as gatekeepers for  
7           what the Supreme Court has called the modern public square,  
8           referring, of course, to the Internet.

9           And, as a result, these companies, including Facebook,  
10          excise discourse that no entity, public or private, has ever  
11          exercised in American history. In the United States, no  
12          governmental official, from the lowest to the highest, has the  
13          power to excise a single fact or opinion from even the smallest  
14          corner of the public square, public discourse. Yet every day  
15          Facebook, Your Honor, dictates for hundreds of millions of  
16          Americans what facts, what opinions, what voices.

17          Now, this vast censorship power, of course, does not by  
18          itself make Facebook a governmental actor. That's not how  
19          state action doctrine works. We all know that. But what it  
20          does mean is that courts must stand ready to apply  
21          well-established traditional state action doctrine whenever the  
22          federal government seeks to harness that censorship power to  
23          use it for its own purposes, because, Your Honor, it is  
24          axiomatic.

25          And here I'm quoting the Supreme Court's *Norwood* opinion.

1 It is axiomatic that the government may not induce, promote, or  
2 encourage private parties to accomplish what it, the  
3 government, is constitutionally forbidden to accomplish or, as  
4 the Ninth Circuit held in *George versus Edholm*, just a few  
5 years ago, state action must be found whenever governmental  
6 officials are deliberately -- and I'm quoting -- coercing,  
7 inducing, or encouraging private parties to do what they  
8 themselves, the government officials, cannot constitutionally  
9 do.

10 Now, that simple principle is what this case is all about,  
11 because since 2019 federal actors have precisely been  
12 encouraging, promoting, coercing, and inducing Facebook to take  
13 more and more aggressive censorship action against so-called  
14 vaccine misinformation.

15 And that's why this case, by the way, is different from  
16 all other previously litigated cases concerning state action in  
17 the online world.

18 **THE COURT:** So can CDC publish a brochure that says  
19 "We disagree with all the things that CHD is saying"?

20 **MR. RUBENFELD:** Absolutely.

21 **THE COURT:** So they can do that?

22 **MR. RUBENFELD:** Yes, they can.

23 **THE COURT:** So tell me again what they're harnessing  
24 Facebook to do that they can't do?

25 **MR. RUBENFELD:** Okay. Let me go ahead and do that.



1 So my colleague, Mr. Teich, has gone through joint action. And  
2 I'll just say a word about that, and then I will go on to talk  
3 about coercion and encouragement.

4 But on the joint action front, what CDC cannot do is  
5 partner with a social media organization and decide, Look,  
6 here's the speech that we want you to censor. Will you do that  
7 for us? Facebook responds. Sure, we'll do that. You tell us  
8 what's going to count as misinformation and we'll stamp --  
9 we'll restrict it as long as, you know, it follows your  
10 protocols, your guidelines.

11 That's exactly what we are alleging they're doing. And  
12 it's not that secret. CDC calls Facebook its partner. It says  
13 it's "partnering with social media companies" -- who else is  
14 that referring to other than Facebook? Certainly plausible  
15 inference -- "to curb the spread of vaccine misinformation."  
16 It's partnering with them. That's joint action.

17 For its part, Facebook says, "We're partnering with the  
18 CDC to help curb the spread of vaccine misinformation."  
19 Plausible inference? They're working together. Not even a  
20 plausible inference; they're saying it to us.

21 We don't know the details of the partnership. That's for  
22 discovery. But we're not alleging something and then seeing if  
23 it's true. They're saying it; we're quoting them saying it.  
24 It's a plausible inference that they're working together  
25 because they're telling us that they're working together.

1 And, similarly, the White House has said "We are directly  
2 engaged with Facebook and other" -- Facebook particularly --  
3 "and other social media companies." Facebook replies, "Yes,  
4 that's right. And we called the White House and said we agreed  
5 we would provide any assistance we could."

6 Again, they're telling us they're working together.  
7 Working together is joint activity. There's no space between  
8 those two words or concepts. So that's a plausible interest.

9 That's all I'm going to say on joint action. With Your  
10 Honor's permission, though, I'm happy to answer questions. I  
11 would now move on to coercion.

12 **THE COURT:** Okay.

13 **MR. RUBENFELD:** And I would just note, Your Honor,  
14 these factors, these three factors -- joint action, coercion,  
15 encouragement -- they are cumulative. Each one is sufficient,  
16 if strong enough, to base the finding of state action.

17 But the Court may use each one as a factor, if the Court  
18 finds it, and use it cumulatively, additively, to tip the scale  
19 in favor of state action. That's exactly what the Ninth  
20 Circuit did in last year's *Rawson versus Recovery Innovations*  
21 case. And Your Honor may do it as well, and we would encourage  
22 that.

23 Now, as to coercion, since 2019, high-ranking members of  
24 Congress have repeatedly threatened Facebook -- this is our  
25 allegation, and it's based on statements in the public

1 record -- with catastrophic legal consequences, including loss  
2 of their Section 230 immunity, which is worth billions of  
3 dollars to them, and loss of Instagram and WhatsApp, their  
4 crown jewels, through an antitrust breakup if Facebook refused  
5 to do more to censor so-called vaccine misinformation.

6 Now, of course, congressmen are permitted to -- to  
7 criticize private companies and to exhort them to take whatever  
8 action they want. We're not saying otherwise. Of course, they  
9 are. But the test for deciding when such exhortation crosses  
10 the line into coercion, the test -- the legal test was laid  
11 down by the Second Circuit 40 years ago in a case called  
12 *Hammerhead*, which has been quoted and followed all over the  
13 country, including by the Ninth Circuit in the *American*  
14 *Families* case.

15 And the *Hammerhead* test is objective, and I'm going to --  
16 I'd like to quote it to the Court. The test is this:

17 "Where comments of government officials can reasonably  
18 be interpreted as intimating that some form of punishment  
19 or adverse regulatory action will follow" -- failure to  
20 accede to the officials' request -- "a valid First  
21 Amendment claim can be stated."

22 And the Ninth Circuit has said squarely that such a threat  
23 need not be explicit or --

24 **THE COURT:** What were the facts in the *Hammerhead*  
25 case?

1           **MR. RUBENFELD:** The facts in *Hammerhead* -- I wish I  
2 could answer that question better for Your Honor, and I'm just  
3 going to tell you right now, they're not going to be analogous  
4 to the facts in this case.

5           **THE COURT:** Oh.

6           **MR. RUBENFELD:** But I'm using *Hammerhead* as a test --  
7 as a legal test, and the Ninth Circuit has reaffirmed that as  
8 the test in the *American Families* case. And there have been  
9 repeated congressional statements that passed this test, the  
10 *Hammerhead* test.

11           And let me also point out that the Ninth Circuit has said  
12 that as long as a reasonable fact-finder, taking all inferences  
13 in favor of plaintiff, could find that there was the intimation  
14 or insinuation of a threat of governmental power or sanction --  
15 that's the Ninth Circuit's phrase for it -- that's all the  
16 District Court's job on motion to dismiss should be. After  
17 that it's discovery and for a jury. And the Ninth Circuit has  
18 said so explicitly in the *Brodheim* case.

19           **THE COURT:** Now, you mean that's a threat from one  
20 congressman?

21           **MR. RUBENFELD:** Oh, absolutely not. Although, I --  
22 you know, we'd argue that Representative Schiff's comments pass  
23 the *Hammerhead* test.

24           **THE COURT:** I think he would be very proud if he knew  
25 you were saying he could direct what the Congress does. Nobody

1 seems to be able to do that these days.

2           **MR. RUBENFELD:** I agree. But when there are a half  
3 dozen similar congressional statements, when there are four or  
4 five public hearings, when CEOs from big tech, including  
5 Mr. Zuckerberg, have been grilled about whether they're going  
6 to do more to censor vaccine misinformation, even as  
7 congressmen are introducing bills to take away Section 230  
8 immunity or to break them up under Facebook, the Speaker of the  
9 House of Representatives, last year, 2020, said the following.

10           Here's the exact statement, Your Honor, the exact  
11 statement as Congress was holding one of the hearings that I  
12 just described: "Social media companies have utterly failed to  
13 stop the spread of COVID disinformation on their platforms."  
14 And she warned that Congress, quote, "must send a message to  
15 social media executives 'you will be held accountable for your  
16 misconduct.'"

17           Could a reasonable fact-finder see in that statement the  
18 insinuation that some adverse legal action might be taken? I  
19 don't see how you could say that a reasonable fact-finder  
20 couldn't so interpret that.

21           In fact, I think that's exactly what she was saying, but I  
22 think it's surely a reasonable fact-finder could so determine.  
23 And that's all that the *Hammerhead* test requires.

24           And, by the way, there are four or five statements like  
25 this. They're public statements. They're in the public

1 record. They're on the -- Congresswoman and Senator -- Senator  
2 Klobuchar, just a few months ago, made a very similar  
3 statement, and they're on their websites. So it's not just  
4 Schiff.

5 And, you know, I think it's important to say that, once  
6 the statements have been made, it is actually not part of  
7 plaintiff's proof to show or to allege that Facebook made the  
8 decision in response to the threat.

9 The Ninth Circuit held that explicitly in the *Carlin*  
10 *Communications* case, which we cite in our brief, and reaffirmed  
11 that recently in the -- in the *Rawson* case.

12 Your Honor --

13 **THE COURT:** Do you have any comments on the recent  
14 cases from this district in -- that Judge DeMarchi wrote?

15 **MR. RUBENFELD:** Absolutely. So defendants make a lot  
16 of the *Daniels* case. And with all due respect to the  
17 magistrate judge, she was not informed of the precedent. She  
18 rendered her decision explicitly on the ground that the  
19 representative did not have legal control over Facebook. Read  
20 the opinion. That's what she says. That is not the test.

21 Every circuit court to have reached this question has held  
22 to the contrary. The Second Circuit explicitly said that it is  
23 reversible error for a district judge to dismiss a case on the  
24 ground that the person making the threat -- the official making  
25 the threat did not have regulatory or legal control.

1       That's the *Okwedy* case quoted and followed by courts all  
2 over the country. Quoted and followed, by the way, in the  
3 Ninth Circuit in *Brodheim*, although not on this exact issue.  
4 But quoted on this exact issue by the Seventh Circuit, the  
5 Fifth Circuit.

6       So with all respect to the magistrate judge, it was  
7 simply -- the opinion --

8           **THE COURT:** It was just wrong.

9           **MR. RUBENFELD:** Yes. It was based on a legal error.  
10 She was not informed of the actual precedent. I don't know why  
11 the parties didn't inform her. She didn't find it. But she  
12 rested on a ground that has been rejected by every circuit  
13 court in the country.

14           **THE COURT:** And that would be exactly what, that's  
15 been rejected by every circuit court in the country? The  
16 idea --

17           **MR. RUBENFELD:** The *Daniel* court's holding that the  
18 reason why the statements made by the congressman did not  
19 amount to state action was because the congressman did not  
20 have, quote, legal control over the actor, the private party in  
21 question.

22       And if you read the opinion, you'll see that the opinion  
23 rests on that ground, and it is simply incorrect as a matter of  
24 law.

25       In addition, I would point out that in the *Daniels* case,

1 as the judge expressly noted, no claim of compulsion had been  
2 made. So, in fact, the magistrate judge did not have reason to  
3 apply the *Hammerhead* test. So, you know, it wasn't her fault.  
4 No claim of compulsion had been made.

5 We, on the contrary, make the claim of compulsion. And  
6 defendants' argument that *Sutton* somehow blocks that, as  
7 anybody who reads *Sutton* and subsequent Ninth Circuit opinions  
8 is aware, *Sutton* only applies when the sole claim of compulsion  
9 is coming from a, quote, generally applicable law, a generally  
10 applicable statute, like a speed limit that tells everybody  
11 they've got to drive under the speed limit. That doesn't turn  
12 everybody into state actors, obviously.

13 When particular government officials are making comments  
14 threatening the private party to do something unless they do  
15 something, that's governed by the *Carlin* case, which is a Ninth  
16 Circuit case where that happened.

17 And the *Sutton* case specifically says we're not overruling  
18 *Carlin*. That's a different case because there was that kind of  
19 governmental official intervention. And, also, it's also  
20 governed by *Mathis*, same thing.

21 And Mr. Teich is absolutely correct, I want to really say  
22 this explicitly, Your Honor, defendants make a great deal out  
23 of the claim that the government did not specifically direct  
24 the specific challenged conduct; that is, the restricting of  
25 CHD's content.



1 The Ninth Circuit confronted that argument and rejected it  
2 in *Mathis* and said it doesn't matter if they didn't direct this  
3 particular action. What matters is if they gave the private  
4 party the standard of decision -- I'm quoting -- the standard  
5 of decision, just what we're alleging here.

6 The CDC gives Facebook the standard decision. Here are  
7 the truths about COVID and the vaccine. Here are the truths  
8 about the treatments for COVID and the -- for COVID. If  
9 content departs from those then, please, do suppress it.

10 That's the standard of decision. It makes no difference  
11 that the CDC or the White House didn't specifically call for  
12 the censoring of plaintiff's content; although they might have,  
13 but it doesn't matter if they didn't.

14 **THE COURT:** And it doesn't matter if what the CDC said  
15 was true?

16 **MR. RUBENFELD:** Well, uhm, false speech -- if Your  
17 Honor were to reach the question and decide that CHD content is  
18 false, which it's not, but if it were, it would still be  
19 constitutionally protected.

20 But, in fact, we believe, if the Court looks at it or if  
21 an ultimate fact-finder looks at it, you will find -- I'm going  
22 to stop talking for a second because I'm worried that you can't  
23 hear me.

24 **THE COURT:** I can hear you.

25 **MR. RUBENFELD:** Am I lost?

1           **THE COURT:** No.

2           **MR. RUBENFELD:** Great. Oh, thank heavens. Okay.

3           So false speech is, of course, constitutionally protected,  
4           but here -- but I don't think Your Honor needs to reach the  
5           question, on a motion to dismiss, whether our speech was false.  
6           Our allegation is it's true. I believe those allegations  
7           should be accepted as true for purposes of this motion.

8           And so it -- CHD's speech is unquestionably  
9           constitutionally protected even if it were false. But on our  
10          allegations it's not false, and I believe those allegations  
11          should be taken as true here on this motion for -- for sure.

12          Unless Your Honor has further questions about coercion, I  
13          believe that factor counts very strongly in favor of a finding  
14          of state action here.

15          I will now turn to encouragement.

16          **THE COURT:** Okay. And just let me give everybody a  
17          heads-up. The defendants have used 20 minutes, and the  
18          plaintiffs have used 40 minutes. Just so you know.

19          **MR. RUBENFELD:** Thank you, Your Honor.

20          **THE COURT:** You're welcome.

21          **MR. RUBENFELD:** No excuse, but I did have some  
22          technical difficulties.

23          But, anyway, so I'm going to turn to encouragement and I'm  
24          going to try to cover this briefly.

25          Here what's all important is Section 230, the famous

1 Section 230 of the Communications Decency Act, which is an  
2 immunity statute.

3 **THE COURT:** Right.

4 **MR. RUBENFELD:** Section 230 immunizes Facebook if it  
5 restricts constitutionally protected speech -- I'm quoting the  
6 statute -- if Facebook finds it, quote, objectionable.

7 Why am I emphasizing it's an immunity statute? Because  
8 that's unusual and because under *Skinner*, the Supreme Court  
9 *Skinner* case, an immunity statute plus in combination with  
10 governmental involvement is a very strong factor weighing in  
11 favor of state action as a form of encouragement and  
12 inducement.

13 *Skinner*, as the Court, I'm sure, is aware, involved  
14 federal regulations pertaining to drug tests performed by  
15 private railway companies on their own employees, seemingly  
16 totally private conduct. But these regulations -- some of the  
17 regulations mandated the drug tests. And that, of course,  
18 turned the drug tests, the mandated ones, into state action  
19 under the compulsion test. That was clear.

20 But one part of the regulation, subpart D, was not  
21 mandatory. It was permissive, just like Section 230. It said  
22 to the railway companies, you can do it, but you don't have to.  
23 But what it did do was it immunized them from any state law  
24 liability.

25 It preempted state law, cleared away legal obstacles, and

1 said you can't be sued, just like Section 230. And the Supreme  
2 Court said that, in combination with some evidence of joint  
3 action, which I'll get to in a second, was sufficient to turn  
4 the private drug tests, though permitted, not required, into  
5 state action, because of the immunity.

6 Now, the other two factors the Court emphasized in  
7 *Skinner*, number one, the government said the Court had  
8 expressed a -- had made plain -- I'm quoting -- its strong  
9 preference -- I'm quoting -- for the drug tests to be  
10 conducted.

11 Well, here, Your Honor, governmental actors -- the White  
12 House, the CDC, and congressmen -- have made plain their strong  
13 preference for vaccine misinformation to be suppressed or  
14 curbed online. Exact same.

15 And the final element of *Skinner* was some evidence that if  
16 the private railway companies chose to do the drug tests, that  
17 the government would have some involvement if they chose to.  
18 Way less than the involvement the government has here with the  
19 CDC providing the standards of decision.

20 But in combination those three factors, the Court said,  
21 were sufficient to turn private conduct into state conduct,  
22 emphasizing the immunity statute.

23 And for that reason, Your Honor, we would argue that  
24 Section 230, in combination with the other factors of this  
25 case, is another strong factor of encouragement and inducement

1 weighing in favor of a state action finding.

2 Now, I'm happy to take questions, but what I'd like to do  
3 is turn to defendants' *Bivens* arguments. You'll remember that  
4 the defendants had a number of arguments claiming that, even if  
5 there is state action, we still have no constitutional claims  
6 because of *Bivens*.

7 May I turn to that, Your Honor --

8 **THE COURT:** Sure.

9 **MR. RUBENFELD:** -- or I'm happy to say more about  
10 *Skinner*.

11 So the *Bivens* arguments, Your Honor, are really very --  
12 they're really misconstruing the law.

13 First of all, *Bivens* has nothing to do with our right to  
14 equitable relief for ongoing constitutional violations. This  
15 is very important.

16 The Ninth Circuit has specifically held that *Bivens*,  
17 because it's a damages remedy, is neither necessary nor  
18 appropriate -- I'm quoting -- neither necessary or appropriate  
19 when plaintiffs are seeking equitable relief.

20 Why? Because equitable causes of action -- I'm quoting --  
21 equitable causes of action arise directly under the  
22 Constitution.

23 And the court, the Ninth Circuit, has singled out -- this  
24 is *Sierra Club versus Trump*, cited just last year -- the First  
25 Amendment as one of those provisions that generate a cause of

1 action, equitable cause of action directly, not the judge-made  
2 *Bivens* cause of action that we all know about from the famous  
3 *Bivens* case.

4 Second, defendants' *Bivens* arguments also have no  
5 applicability to --

6 **THE COURT:** Wait. The equitable cause of action  
7 directly against whom?

8 **MR. RUBENFELD:** Oh, we have equitable causes of action  
9 against Facebook as an entity. So even if Your Honor were to  
10 find that the damages action cannot run against Facebook  
11 because of *Malesko*, the equitable cause of action, you've got  
12 to put -- you've got to stop curbing CHD's speech. You have to  
13 stop stamping it with these unconstitutional fact checks. You  
14 have to stop shadow --

15 **THE COURT:** Is that part of 1983 or something else?

16 **MR. RUBENFELD:** It's a federal cause of action. As  
17 the Court, of course, is aware, 1983 is for state --

18 **THE COURT:** So it's not 1983, it's something else?

19 **MR. RUBENFELD:** No, it's a direct equitable cause of  
20 action against individuals acting under color of federal law  
21 when they are violating the Constitution. 1983 is, you know,  
22 of course, when the actors operate under color of state law.

23 And the equitable cause of action does not arise under  
24 *Bivens*; it arises directly under the Constitution. *Bivens* has  
25 nothing to say about it.

1        *Bivens* also has nothing to say about our takings claim,  
2        which, similarly, arises directly under the Fifth Amendment  
3        because of the Fifth Amendment's, quote, self-executing nature.  
4        I'm quoting the Supreme Court from 50 years ago on this.

5        And *Bivens* claims, again, can be brought against corporate  
6        entities. So even if *Bivens* claims cannot, if the Court so  
7        finds, takings claims undoubtedly can be.

8        The United States Supreme Court's *Loretto* decision is a  
9        takings case brought against a private telephone company. And  
10       there are other cases of that sort that we cite in our brief.  
11       As long as the state action, the federal action, requirement is  
12       satisfied, you can bring a takings case against a private  
13       corporation.

14       With respect, finally, to what are our *Bivens* claims, of  
15       course, we are making *Bivens* claims. Those are our damages  
16       claims in particular against Mr. Zuckerberg, who we do allege  
17       had a specific individual participatory decision-making  
18       responsibility over the fundamental decision to, one,  
19       deplatform Mr. Kennedy; and, two, to adopt the partnership with  
20       the CDC that we've discussed.

21       The --

22       **THE COURT:** Deplatform Mr. Kennedy? That's what  
23       you're calling it?

24       **MR. RUBENFELD:** They terminated his Instagram account,  
25       yes, Your Honor. And we've so pled in the Rule 15(d)

1 supplement.

2 But the *Bivens* damages claim is a First Amendment claim.  
3 But, Your Honor, the Ninth Circuit has squarely held that  
4 *Bivens* claims in this circuit can be stated for First Amendment  
5 violations and can be stated against private actors for -- that  
6 that doesn't prevent a *Bivens* claim from being stated.

7 The Court so held in the *Schowengerdt* case back in '87,  
8 and reaffirmed that in the *Vega* case. That's the Ninth  
9 Circuit, 2018. *Bivens* First Amendment claims can be stated  
10 against private actors. The only key issue is -- in those  
11 cases is whether there are adequate alternative remedies, the  
12 famous, you know, *Bivens* factors.

13 And here, Your Honor, there are no alternative remedies,  
14 whatsoever, for the conduct that we're alleging as the First  
15 Amendment violation; viewpoint discrimination, prior restraint.  
16 No law, federal or state, makes that unlawful. Only the First  
17 Amendment can make that unlawful.

18 We have alleged that CHD has suffered hundreds of  
19 thousands of dollars in lost donations as a result of what  
20 defendants have done. And for that injury, Your Honor, there's  
21 no -- nothing other than a *Bivens* damages claim. It's *Bivens*  
22 or nothing.

23 **THE COURT:** But could the Congress enact a statute  
24 that precluded Facebook from discriminating against what you're  
25 calling this vaccine misinformation?



1           **MR. RUBENFELD:** What an excellent question, Your  
2 Honor.

3           I believe that the very large social media companies can,  
4 as Justice Thomas suggested very recently in his *Knight*  
5 concurrence, they can be regulated and treated as public  
6 utilities or so-called common carriers. Common carriers were  
7 historically under the requirement that they not discriminate  
8 on the basis of viewpoint but take all comers.

9           If you accept Justice Thomas's view about this, that  
10 Congress or perhaps even the states can legislate -- by  
11 legislation, regulate them as common carriers or -- yeah, I  
12 guess, "common carriers" is the right word for that, then the  
13 answer is yes.

14           Certainly, a question Your Honor does not have to reach in  
15 this case, but I believe the answer to that would be yes. And,  
16 certainly, Justice Thomas indicated his approval of that  
17 approach in his recent *Knight* concurrence.

18           **THE COURT:** Okay. So that'd be an alternative then?

19           **MR. RUBENFELD:** It would be a potential alternative.  
20 If it is constitutional, the court -- courts would have to  
21 decide if it's constitutional, but it certainly doesn't exist  
22 now.

23           The *Bivens* alternative remedy question does not ask could  
24 Congress do something. It asks, is there any remedy available  
25 to the plaintiff now under state or federal law for the injury

1 he has suffered? And the answer is that there is no  
2 alternative remedy. And the Ninth Circuit has specifically  
3 held it must be an adequate remedy, not a, you know,  
4 speculative or a remedy that might or might not happen in the  
5 future.

6 So, Your Honor, with that, I will conclude my remarks.  
7 And I know that Mr. Teich and I have only, I guess, about 10 or  
8 15 minutes left to cover the statutory claims, but I'm sure we  
9 can do that.

10 **THE COURT:** Right.

11 **MR. RUBENFELD:** I will now sit down, so to speak, and  
12 let Mr. Teich handle the RICO claim, if that's all right.

13 **THE COURT:** Well, I thought we were going to be back  
14 and forth on these things.

15 **MR. RUBENFELD:** Oh, I'm sorry.

16 **MR. TEICH:** Your Honor, with permission, Roger Teich  
17 for plaintiff as well. I would just respond to two points that  
18 came up there, if I may, and then --

19 **THE COURT:** Sure.

20 **MR. TEICH:** -- turn it back over to defendants to take  
21 up the other -- the civil fraud claims.

22 Does that make sense?

23 **THE COURT:** If you want. It's your time.

24 **MR. TEICH:** Sure.

25 On paragraph 50, you pointed out that the CDC is engaging

1 local messengers and partners to contain the spread of  
2 misinformation, work with social media companies. You're quite  
3 right. They don't identify Facebook by name, although I think  
4 it's a highly plausible inference there.

5 But in the next paragraph, the CDC does say Facebook, as  
6 with other social media tools, is intended to be part of a  
7 larger integrated health communications strategy.

8 And in testimony that the CDC gave in December of 2019,  
9 they say: "Stop myths. We will work with local partners to  
10 establish new partnerships and contain the spread of  
11 misinformation. To advance this, we've recently collaborated  
12 with social media companies like Pinterest and Facebook."

13 And this is another point of distinction from the *Daniels*  
14 case. In *Daniels*, there was no plausible allegation of a  
15 meeting of the minds. Here, there's a highly plausible  
16 allegation of a meeting of the minds between Facebook and the  
17 CDC.

18 And with that, Your Honor, we would be prepared to move on  
19 unless you have questions.

20 **THE COURT:** So, in your view, the only misinformation  
21 that the CDC is attempting to keep off the airwaves is your  
22 views on vaccines?

23 **MR. TEICH:** Well, what we allege has occurred here is  
24 a systematic attempt to degrade and destroy CHD. We have put  
25 into the record, in Exhibit B, 15 fact checks that are driven

1 by an algorithm Facebook is alleged to have developed with the  
2 CDC that spots speech that has terms like "vaccine hesitancy"  
3 or "differential outcomes" or "unvaccinated children."

4 **THE COURT:** I mean, are you okay with other  
5 misinformation not being published? It's only your particular  
6 misinformation you don't want published?

7 **MR. TEICH:** I'm confused by the question. We allege  
8 that it's not misinformation at all; it's true fact. And if  
9 you --

10 **THE COURT:** I understand that. But what you're --

11 **MR. TEICH:** Yes.

12 **THE COURT:** You've coined the "misinformation" word to  
13 apply to what CDC is asking Facebook not to do; right?

14 **MR. TEICH:** They coined it.

15 **THE COURT:** What to look for.

16 **MR. TEICH:** They coined it.

17 **THE COURT:** So they may have a whole lot of ideas that  
18 they think are misinformation. But you're calling your  
19 information -- there's more than just your information they  
20 view to be wrong; right?

21 I just -- I'm having a hard time. Let's say there was  
22 something on the Internet that said if you take a COVID vaccine  
23 you're going to grow a third head. That's clearly not true.  
24 Is it okay not to let that be published?

25 **MR. TEICH:** Well, I don't think it's okay if the

1 government is calling the shot, which is the allegation here,  
2 is one answer. And the other answer is --

3 **THE COURT:** Okay. So you think it's inappropriate for  
4 the government to say generally, boy, we would really like it  
5 if all these private social media outlets didn't publish lies  
6 about COVID vaccine. That's not okay to just say that?

7 **MR. TEICH:** Two answers to that. One is, I think it's  
8 the underhandedness of the CDC in using Facebook in this way,  
9 which is problematic from a constitutional point of view.

10 And the other point is that's not what has happened here.  
11 Children's Health Defense is a reputable nonprofit with Nobel  
12 Prize laureates and reputable scientists on an advisory board  
13 and an editorial process for determining what to publish, which  
14 is alleged at length in the complaint.

15 And every one of those articles that's been fact checked  
16 and censored is factual or is opinion on disclosed fact. It's  
17 not false. It's not the three-headed cow, you know, thing  
18 you're talking about. That's not what happened. That's not  
19 this case.

20 **THE COURT:** But --

21 **MR. TEICH:** Yes.

22 **THE COURT:** But the problem I have -- a problem I have  
23 is you're talking about constraining misinformation, but by  
24 that you mean constraining CHD information? That's the bad  
25 thing you're alleging?

1           **MR. TEICH:** That is what has occurred here, and it has  
2 occurred here because, long before the pandemic, Your Honor,  
3 CHD, the plaintiff, was on Facebook from 2017, doing what they  
4 do, criticizing the CDC for its capture by industry, you know,  
5 for any number of things that they're critical of.

6           Facebook took no issue with that until 2019. And the  
7 question is why? And the answer, we submit, is because that's  
8 when the CDC, the government agency, decided that vaccine  
9 hesitancy was public enemy number one, was public health issue  
10 number one.

11           And in the service of that, they announced that in  
12 April 2019. And in the service of that they have worked with  
13 Facebook to take CHD plaintiff down. And that's -- that's what  
14 we are alleging is unconstitutional.

15           **THE COURT:** Okay. Thank you.

16           **MR. TEICH:** Thank you.

17           **THE COURT:** Okay. So do the plaintiffs wish to  
18 discuss the other claims?

19           **MS. MEHTA:** Your Honor, did you mean the defendants or  
20 did you mean the plaintiffs?

21           **THE COURT:** I'm sorry, the defendants. I apologize,  
22 yeah.

23           **MS. MEHTA:** Yes, Your Honor.

24           If I could, I would hope to take just two minutes to very  
25 quickly address a couple of the points that were just raised,

1 and then we'll move on.

2 **THE COURT:** Sure. You can use your time however you  
3 like as long as you recognize you only have so much of it.  
4 That's all.

5 **MS. MEHTA:** Understood, Your Honor. Thank you.

6 So I just want to briefly address a few of the points. I  
7 think the last question and answer with Mr. Teich reveals a  
8 fundamental problem with the *Bivens* cause of action  
9 irrespective of and sort of, you know, above and beyond all the  
10 other problems that we went to, which is the lack of any  
11 plausible allegation of any connection between any of the  
12 things they allege; the CDC, Representative Schiff, antitrust  
13 hearings, all of these things which seem completely orthogonal  
14 to the issue at hand.

15 But even if you accept all of those allegations, none of  
16 them go to the specific action requirement, which is that there  
17 is nothing alleged that suggests that the CDC encouraged,  
18 coerced, was jointly acting with Facebook or with the  
19 third-party fact-checkers as to the specific challenged conduct  
20 which is the CHD posts.

21 At best, they have alleged -- and this is giving them all  
22 of the benefit of their allegations, which we don't agree with.  
23 At best, they have alleged that what the CDC has done here is  
24 said, "We would like social media companies to not have  
25 misinformation on their platforms."

1       The CDC is not alleged to have taken any specific action,  
2 jointly or through coercion or through encouragement or  
3 otherwise, with respect to CHD. There's no allegation that it  
4 said "you should find this particular post to be misinformation  
5 or label it as being potentially having inaccurate information  
6 in it."

7       Nothing is specifically tied to the actual conduct at  
8 issue, and that is a fundamental defect that permeates every  
9 theory that you just heard them talk about for the last hour.

10       And, separately from that, I want to talk briefly about  
11 the equitable relief claims because we didn't have a chance to  
12 touch on that before. With respect to the equitable relief  
13 claim, a couple of things.

14       First, there still would have to be state action. So they  
15 seem to acknowledge that they have a *Malesko* problem with  
16 respect to Facebook under *Bivens*. They didn't have any  
17 meaningful response to Mr. Zuckerberg's actual personal  
18 involvement in these decisions as to a *Bivens* claim as to him  
19 personally.

20       So, instead, what you heard was, "Well, we still have our  
21 equitable relief claims." They would still have to have state  
22 action. And for all the reasons I talked about before, there  
23 is no allegation of state action here, including that there was  
24 nothing specific to CHD or nothing specific to the challenged  
25 conduct. And because all of the theories that you heard with



1 respect to coercion, encouragement, all of that, fundamentally  
2 are inconsistent with the Ninth Circuit's case law, including  
3 the *Gorenc* case, which I cited, including *Mathis*, which I  
4 cited, and as we've laid out in our briefing.

5 And I'm happy to address, you know, specific points that  
6 he made -- that Mr. Rubinfeld made or Mr. Teich made, but at  
7 the end of the day it is a theory that takes existing precedent  
8 and would require the Court to extend it in multiple different  
9 ways but is fundamentally inconsistent of the whole framework  
10 of liability under *Bivens*.

11 So with respect to the equitable relief, they would still  
12 have to plead state action, and they haven't done that under  
13 any of these theories. The idea that the CDC is saying "We'd  
14 like social media companies generally to not have  
15 misinformation on their platform" is not joint action with  
16 respect to the challenged conduct.

17 The idea that the CDC says, "Don't have misinformation on  
18 your platform, but let's have truthful and accurate information  
19 on your platform" is not encouraging Facebook to take any  
20 action with respect to CHD's particular speech.

21 **THE COURT:** What about if it's in connection with one  
22 phenomenally powerful representative saying, "And if you don't,  
23 we're going to take away your 230 immunity"?

24 **MS. MEHTA:** So, first of all, I don't think it's  
25 plausibly alleged that he actually made a threat that would

1 connect those two things directly.

2 But even if it were, one representative does not have the  
3 power to do anything with respect to Facebook. Even half a  
4 dozen, which I think Mr. Rubinfeld said, well, there's a half a  
5 dozen people who said that, that is not going to actually  
6 create a threat that Congress is going to do anything with  
7 respect to Facebook, because Congressional action requires a  
8 lot more than a half a dozen statements from members of  
9 Congress.

10 And I think if we actually look at the allegations, really  
11 what they're doing is asking questions. They're doing exactly  
12 what, in *Mathis*, was found to be congressional inquiry into a  
13 problem, not a threat.

14 But apart from all of that, even if we were to say somehow  
15 that that's a threat, and even if we were to say one member of  
16 the House of Representatives or half a dozen legislators had  
17 the power as individuals to create government coercion, nothing  
18 connects those allegations to the specific challenged conduct  
19 here.

20 Nobody says, "You need to do something about CHD's posts  
21 or we're going to come after you under Section 230." Nobody --  
22 I mean, it's the fanciful allegation that, you know, antitrust  
23 inquiries that are happening in Congress are somehow connected  
24 to CHD's posts here. It doesn't hold together even if we read  
25 every allegation and plausible inference in their favor.

1 And then with respect to the takings claim, which is  
2 separate, the takings claim is specific to the *Donate* button,  
3 the CHD *Donate* button, which they're saying was taken down.

4 There's no allegation that the CDC or Representative  
5 Schiff or any member of Congress ever said anything with  
6 respect to the *Donate* button.

7 So even if you were to buy into the theory they've  
8 articulated that somehow, you know, in trying to create  
9 truthful information on the platform is state action, the  
10 *Donate* button has never come up. And there's no suggestion  
11 that anyone at the CDC or in Congress or otherwise had any  
12 communications with respect to that. So the takings claim sort  
13 of independently fails for lack of state action on that basis,  
14 and that goes to their equitable relief.

15 The final point I want to make on the equitable relief,  
16 and then I'm going to turn it over because it's a natural  
17 segue, is the First Amendment implications of their equitable  
18 relief that they're asking for.

19 They are suggesting that this Court should restrain  
20 Facebook's free speech rights by issuing an injunction as to  
21 what Facebook can and can't do on its platform. And that --  
22 there is a First Amendment issue in this case, and that is the  
23 issue that's raised with respect to the First Amendment.

24 This is not a *Bivens* issue. This is not an equitable  
25 relief based on state action restraining First Amendment as to

1 their speech, but there is a fundamental First Amendment  
2 problem with what they're asking for in that equitable cause of  
3 action.

4 So I think that's a nice segue to have me turn it over to  
5 my partner, Mr. Holtzblatt, who's going to address causes of  
6 action two and three, unless you had any questions, Your Honor.

7 **THE COURT:** No. I was just going to say, you say,  
8 well, they're asking you to, yourself, impair Facebook's First  
9 Amendment rights by claiming equitable relief.

10 I suppose in the old days we would just have a libel  
11 action. It would be a tort. It would be, well, you have  
12 impaired my business and reputation by telling a lie about me  
13 when you post on my Facebook page that I'm spewing  
14 misinformation.

15 That'd be an approach that both First Amendment -- both  
16 First Amendment interests would be protected; right? Because  
17 if it's false, then there's no protection. But each -- each  
18 actor is entitled to say whatever he wants. That would be a  
19 way to approach it, I guess.

20 **MS. MEHTA:** Yeah, it's true, Your Honor, that they  
21 could have, I guess, theoretically, pled some sort of claim for  
22 defamation or libel or something. I don't want to presume why  
23 they didn't do it other than that would raise a host of issues,  
24 including, you know, Section 230 immunity. There would be the  
25 combating --

1           **THE COURT:** Oh.

2           **MS. MEHTA:** -- First Amendment claims.

3           **THE COURT:** I got you there, yeah.

4           **MS. MEHTA:** There might be anti-SLAPP issues. I think  
5 there's a lot of reasons why that claim would fail too. But  
6 they obviously made the decision not to plead it.

7           And, you know, instead they've pled theories, including  
8 the *Bivens* claim, the RICO claim, the UCL claim, that all seem  
9 to really have -- to be a fundamental mismatch with the core of  
10 their allegations.

11           And -- but the fact that they chose not to plead  
12 defamation or libel or something that's more traditional  
13 doesn't resolve the problem that confronts the Court --  
14 right? -- which is why they've pled what they pled and the  
15 problems with what they've pled.

16           **THE COURT:** Okay. So you want someone else to speak  
17 now?

18           **MS. MEHTA:** Yes. Thank you, Your Honor.

19           **MR. HOLTZBLATT:** Thank you, Your Honor. Ari  
20 Holtzblatt. I'm going to address counts two and three. And  
21 the hour is now late, and so my suggestion is that I address  
22 them together --

23           **THE COURT:** Okay.

24           **MR. HOLTZBLATT:** -- because a number of our defenses  
25 speak to both of them.

1 I'm going to start with two threshold defenses, the First  
2 Amendment and Section 230 defenses, because they cut across  
3 both of those claims. And then I'll turn to specific defects  
4 with respect to the Lanham Act and the RICO claim.

5 As my colleague, Ms. Mehta said, CHD is right that there  
6 are significant First Amendment interests in this case, but  
7 those significant First -- but it is wrong about the  
8 consequence for this case of those significant First Amendment  
9 interests.

10 By seeking to stop defendants from speaking and from  
11 making their own editorial judgments on the way topics of the  
12 safety and efficacy of vaccine misinformation, CHD's claims  
13 intrude on defendants' own First Amendment rights.

14 Now, with respect to the First Amendment, I want to make  
15 two points, Your Honor. The first is that the First Amendment  
16 protects the exercise of editorial control and judgment.  
17 Whether that's the decision of a newspaper, in *Miami Herald*  
18 *versus Tornillo*, about whether to run a politician's op-ed; or  
19 the decision to parade organizers in *Hurley*, about who can  
20 march in their parade; or the decision of an online platform to  
21 filter or moderate third-party content, as *Zhang versus Baidu*  
22 held at 10 F.Supp.3d 433, and numerous other courts have held  
23 as well.

24 Now, this principle of editorial control and judgment  
25 protects most of the conduct that CHD challenges in this case,

1 including the decision to remove or reduce the distribution of  
2 CHD's posts or to restrict CHD's access to advertising or  
3 fundraising tools. Simply put, Your Honor, CHD may not invoke  
4 the power of this court to compel defendants to override  
5 defendants' own editorial judgments.

6 The second First Amendment principle that I want to  
7 address, Your Honor, is the fact that CHD challenges fact  
8 checks, all of which disclose not only the fact-checker's  
9 conclusion that a post contains false information, but that  
10 those fact checks also disclose the factual basis for that  
11 conclusion. That is significant.

12 As the Ninth Circuit held in *Partington v. Bugliosi*, when  
13 a speaker outlines, quote, the factual basis for his  
14 conclusion, his statement is protected by the First Amendment.  
15 And the reason for that, Your Honor, is because in that  
16 circumstance the reader remains, quote, free to draw his own  
17 conclusions about the correctness of that conclusion based on  
18 the disclosed underlying facts. Now, that's at 56 F.3d at 1156  
19 to 1157.

20 And to provide an example of that, Your Honor, in  
21 paragraphs 129 to 138 of the complaint, CHD posted an article  
22 by Dr. Brian Hooker, along with a note saying that the article  
23 supports the view that, quote, unvaccinated kids are healthier.

24 This was reviewed by independent fact-checkers who  
25 indicated that the post contains false information, and so

1 Facebook displayed a gray overlay on this particular post,  
2 quote, False information checked by independent fact-checkers.

3 But, now, this is key, Your Honor. There was also a  
4 button that said "*See Why*." And when a user might click on the  
5 button "*See Why*," the button would lead to a page explaining a  
6 number of things about how the fact-checker can reach that  
7 conclusion.

8 That underlying post was, quote, unsupported because it  
9 is, quote, based on a single study which used highly biased  
10 methods, failed to control for confounding factors in  
11 comparison to vaccinated/unvaccinated children, such as  
12 healthcare-seeking behavior, and used patient data from  
13 hand-picked pediatric clinics only.

14 Now, all of the fact checks -- and Mr. Teich mentioned the  
15 15 fact checks that are included as an exhibit. And Your Honor  
16 can look at those, and you will see that all of those fact  
17 checks have a similar structure. There is a "*See Why*" button  
18 that points to another page where the underlying facts that the  
19 fact-checker was basing their ultimate conclusion on is  
20 disclosed.

21 The First Amendment does not permit CHD to challenge the  
22 fact-check label, just the conclusion which merely conveys how  
23 the fact-checker interpreted underlying facts, which are not  
24 challenged as false, that are made available to the reader.

25 So those are two initial points on the First Amendment,



1 Your Honor.

2 I'd like to then turn to Section 230, which, like those  
3 First Amendment defenses, applies to both the Lanham Act and  
4 RICO claims.

5 And, Your Honor, just to pause, the reason that I want to  
6 start with the First Amendment defense and the Section 230  
7 defense is because, although I believe that all of the defects  
8 we have pointed out in our briefs would support dismissal with  
9 prejudice, we believe that is especially true with respect to  
10 the First Amendment and the Section 230 defense, both of which  
11 are intended to protect not only from liability but also the  
12 burdens of litigation.

13 And the burdens of litigation in this case, Your Honor,  
14 have been extraordinary as we are already through three  
15 different complaints before Your Honor has even heard the  
16 motion to dismiss, a motion to supplement the facts. And if  
17 there were to be another complaint in this case, it would be  
18 the fifth bite at the apple. And so that's one of the reasons  
19 why it's so important, we believe, to emphasize these First  
20 Amendment and Section 230 defenses.

21 Now, as to the Section 230 defense, Your Honor, as Your  
22 Honor, I'm sure, knows, Section 230(c)(1) bars any claim that  
23 would treat a provider of an interactive computer service as  
24 the publisher of content, quote, provided by another  
25 information content provider.

1       It, therefore, protects Facebook and Mr. Zuckerberg from  
2       liability for treating Facebook as the publisher of content  
3       created not by Facebook but by third parties, whether that's  
4       third-party content created by third-party fact-checkers or by  
5       CHD itself.

6       Now, many courts in this district have recognized this  
7       principle applies when the claim is that the platform has  
8       removed content because removing content is a traditional  
9       publisher activity. For example, the *Sikhs For Justice* case at  
10      144 F.Supp.3d at 1088. And that principle precludes, much like  
11      the First Amendment principle that I started with, any theory  
12      based on restricting access to or declining to boost CHD's  
13      posts.

14      Second, Your Honor, Section 230, likewise, protects  
15      distributing content created by third parties. And the key  
16      question for this application of Section 230 is who was, quote,  
17      responsible for what makes displayed content illegal or  
18      actionable? And that's from the *Kimzey* case, *versus Yelp*, at  
19      836 F.3rd 1263, from the Ninth Circuit.

20      Here, what makes the content allegedly unlawful is the  
21      determination that CHD's posts contain false information.  
22      That's the key component of the content that CHD is trying to  
23      challenge. And that determination, Your Honor, was not made by  
24      Facebook or by Mr. Zuckerberg but by independent fact-checkers.

25      Facebook then translated that third-party determination

1 into gray overlays that were superimposed on CHD's posts in  
2 much the same way that Yelp translates user ratings into its  
3 proprietary star-rating system.

4 As the Ninth Circuit explained in the *Kimzey* decision,  
5 which I just pointed Your Honor to, this is a neutral tool for  
6 displaying user-generated content. And when you use a neutral  
7 tool to translate content generated by a third party into  
8 display on the platform, it does not amount to content  
9 development.

10 Now, CHD makes two points in response to the Section 230  
11 defense that I want to touch very briefly on, Your Honor.

12 The first is to cite the *Enigma Software Group* case from  
13 the Ninth Circuit, but that case involved Section 230(c)(2),  
14 not Section 230(c)(1), and here Facebook invokes Section  
15 230(c)(1).

16 The second point I would like to address, Your Honor, is  
17 that CHD says that Facebook can be deemed vicariously  
18 responsible for content created by third-party fact-checkers.

19 But the third-party fact-checkers are distinct and  
20 independent corporate entities. As counsel for Poynter has  
21 already emphasized very strongly, Your Honor, they have their  
22 own organizational operations and identities, and those  
23 identities and operations predated this particular dispute.

24 The notion that this corporate separateness can be ignored  
25 conflicts with the fundamental principle of Section 230, which

1 is that an entity can only be held liable for their own  
2 content, not for the content created by another information  
3 content provider.

4 And we think the *Blumenthal versus Drudge* case is  
5 illustrative of this, Your Honor. That's at 992 F.Supp 44.  
6 There the Court held that AOL could not be held liable for an  
7 allegedly defamatory story published by Matt Drudge, even  
8 though AOL had contracted with and paid Drudge to provide the  
9 specific kind of material that was at issue: gossip and rumor.  
10 They had touted Drudge to its subscribers. It had actually  
11 paid him and retained the contractual right to remove or  
12 require changes to any of those articles.

13 Now, CHD invokes the law of agency, but all of the cases  
14 it cites involves individual people acting as moderators, not  
15 separate, distinct entities as we have here. And we think that  
16 to invoke the law of agency in a case like this would run  
17 counter to the core principle of Section 230, which is that you  
18 are only responsible for content that you, yourself, create.

19 When we're dealing with an entity, in any event, under  
20 agency law there has to be evidence that Facebook has taken  
21 over the day-to-day operations of the fact-checkers with  
22 respect to the very fact checks at issue, and there is no  
23 allegation remotely like that here. At most, there's an  
24 allegation that Facebook created a fact-check infrastructure.

25 Lastly, Your Honor, I'd like to address a couple of key

1 defects in their -- in CHD's Lanham Act and RICO claims and how  
2 their allegations do not plausibly establish the elements of  
3 those claims.

4 Starting with the Lanham Act, CHD asserts a false  
5 advertising claim. To establish a false advertising claim  
6 under the Lanham Act there must be, quote, commercial  
7 advertising or promotion.

8 Courts have emphasized the important constitutional  
9 constraints on liability under the Lanham Act. It was not  
10 intended to and cannot constitutionally be applied to anything  
11 other than commercial speech to avoid precisely the situation  
12 we have here, which is using the Lanham Act to constrict fully  
13 protected noncommercial speech.

14 Of course, the paradigmatic commercial speech is a paid  
15 advertisement designed to promote one's own products or  
16 services. And that's obviously not what the fact-check labels  
17 look like. And that commonsense conclusion, Your Honor, is  
18 confirmed by the formal test for commercial speech.

19 Ordinarily, commercial speech is speech that does no more  
20 than propose a commercial transaction. And, of course, in  
21 close cases but only close cases -- and this is emphatically,  
22 Your Honor, not a close case -- the *Bolger* factors are looked  
23 at. There are three of them.

24 And CHD emphasizes the first of those, which is that there  
25 must be economic motivation. But as the Ninth Circuit held in

1 the *Dex Media* case, at 696 F.3d 952, economic motive itself is  
2 insufficient; the other two factors must also be satisfied.  
3 They are not -- the fact-check labels do not refer to a  
4 specific product and they were not made in the context of an  
5 advertisement.

6 Very briefly, Your Honor, even aside from the commercial  
7 speech limitation, the speech at issue here is not within the  
8 zone of interest of the Lanham Act. To be within the zone of  
9 interest, it is not enough to be injured as a consumer nor is  
10 it enough to be competing in the marketplace of ideas. And  
11 that's all we have here.

12 Finally, Your Honor, turning to RICO -- and I would start  
13 by simply noting Justice Souter's admonition that it is  
14 especially important not to extend civil RICO to  
15 fully-protected First Amendment activity, which, again, is  
16 exactly what CHD is attempting to do here.

17 There are numerous problems, including the failure to  
18 allege the proximate cause or pattern requirements of RICO.  
19 But let me address very briefly even the failure to allege the  
20 elements of the predicate here, which is the wire fraud  
21 statute.

22 Wire fraud requires an intent to obtain money or property  
23 from the one who is deceived. There is no allegation that CHD  
24 itself was deceived even; in fact, quite the opposite. The  
25 fact checks are -- and labels -- the entire point of this

1 litigation, Your Honor, is that CHD vehemently disagrees with  
2 those fact checks, so they cannot possibly have been deceived  
3 by them.

4 But, more fundamentally, CHD is not alleged to have -- no  
5 defendant is alleged to have obtained or intended to obtain any  
6 money or property from CHD. In fact, for example, Your Honor,  
7 one of the allegations is that CHD was prevented from buying  
8 ads on Facebook, which is the exact opposite of seeking to  
9 obtain money or property from CHD.

10 CHD offers an alternative theory that visitors to CHD's  
11 page were somehow deceived. But, as has been emphasized even  
12 by CHD itself repeatedly this morning, Your Honor, the theory  
13 of this case, the entire theory that cuts across all 180 pages  
14 of the Second Amended Complaint, is an effort for the defendant  
15 to convey information to visitors to CHD's page or allegedly to  
16 divert their attention to other sources of information, such as  
17 the CDC, or to the fact-checker's pages where they can explain  
18 the factual basis for their conclusion.

19 There is nothing about that, not plausibly or even  
20 otherwise, Your Honor, that the intent, the purpose, or effect  
21 of the fact checks here was to separate visitors to the CHD  
22 page from their money, which is the requirement to assert wire  
23 fraud.

24 This is emphatically, Your Honor, not a criminal wire  
25 fraud scheme, which is what would be required to establish a

1 RICO claim.

2 So, Your Honor, we -- we have many other defects that  
3 we've identified in our briefs, and we will leave you to pick  
4 and choose from amongst the plethora of them that lead to  
5 dismiss this case.

6 But I do want to again emphasize, Your Honor, there are  
7 serious First Amendment and Section 230 stakes in this case for  
8 defendants, and it is critically important to be able to  
9 protect those interests. To allow yet another complaint in  
10 this case would not only, we think, not be consistent with  
11 judicial economy, Your Honor, but would also burden those very  
12 important interests.

13 And unless Your Honor has any further questions, I'll turn  
14 it over to Poynter's counsel to address anything additional on  
15 these claims.

16 **THE COURT:** All right. Thank you.

17 Just so you know, plaintiffs have now used -- I'm sorry --  
18 defendants have used almost all their time. Anyway, we have a  
19 little bit left.

20 So, Mr. Holtzblatt?

21 **MS. LOCICERO:** It's Ms. LoCicero, Your Honor.

22 **THE COURT:** Oh, I'm sorry.

23 **MS. LOCICERO:** That's okay. For Poynter Institute.  
24 And I will run at warp speed.

25 **THE COURT:** Well, don't talk fast.



1           **MS. LOCICERO:** Okay. I'll hit the highlights. The --  
2     there have been comments about 15 fact checks in Exhibit B. I  
3     want to emphasize that, of the 15, Poynter did one. And that's  
4     the one that we've already talked about relating to the flu  
5     vaccine study.

6           That speech is most emphatically for purposes of the  
7     Lanham Act, not commercial speech. There was no commercial  
8     transaction proposed. The very text of the article establishes  
9     that it's the kind of speech about health information, vaccine  
10    information, a government report, that's the kind of core  
11    speech of public concern that the First Amendment protects and  
12    that the Lanham Act does not address.

13          For -- you can even go back to the landmark case of *New*  
14    *York Times versus Sullivan*. That's cited for the actual malice  
15    propositions in there, routinely, but that involved an ad that  
16    the -- that *The New York Times* at the time would pay \$4,800 for  
17    Heed Their Rising Voices concerning the civil rights movement.  
18    And the United States Supreme Court had no problem finding  
19    that, even though an ad was paid for, that was not commercial  
20    speech.

21          The same thing that Mr. Holtzblatt has already spoken  
22    about, related to a profit motive, isn't enough. There are  
23    many, many cases that stand for the proposition that just  
24    because there's a profit motive involved for newspapers and TV  
25    stations and books and journalistic fact-checking services,

1 like Poynter, that does not convert their speech into  
2 commercial speech. So fundamentally, that's a problem that  
3 plaintiff cannot overcome under the Lanham Act.

4 With respect to the RICO claim, a couple of points, Your  
5 Honor. The -- the allegations are often lumping all the  
6 defendants together. It's impossible to figure out what  
7 Poynter is specifically accused of, and there are just  
8 significant Rule 8 and Rule 9 pleading issues.

9 But to emphasize the point about a lack of any money or  
10 property being acquired, which is fundamental for a wire fraud  
11 predicate act, I would ask the Court to consider the *Monterey*  
12 *Plaza Hotel* case, Ninth Circuit 215 F.3d 925. There a hotel  
13 complained about, sort of, picketing and union behavior that  
14 the court said that the plaintiffs might have found to be  
15 vexatious and harassing, but even that kind of behavior is not,  
16 quote, acquisitive.

17 CHD has not alleged, nor can it allege, that Poynter has  
18 one nickel that belongs to CHD; and that's fundamental and  
19 fatal to the wire fraud claim.

20 There's also a standing problem under the RICO theory of  
21 plaintiffs -- of plaintiff that is illustrated by Judge Rogers'  
22 recent decision in *Pacific Recovery Solutions versus United*  
23 *Behavioral Health*, which there's a Westlaw cite for at the  
24 moment. But there what happened was a healthcare provider  
25 complained, tried to bring a RICO claim because the insurance

1 company would only pay that provider out-of-network benefits,  
2 so they were getting less than they deemed that their services  
3 were worth.

4 And what the Court recognized in that recent decision is  
5 that, look, the damage, if there's any, is really to the  
6 patients who are not being fully reimbursed for the services  
7 that they are receiving. And even though the healthcare  
8 provider in *Pacific Recovery* claimed that they were not  
9 receiving payments from some of the patients, the Court had no  
10 problem finding that *Pacific Recovery* did not have standing to  
11 bring a RICO claim.

12 So to the extent that CHD's claims here turn on some kind  
13 of theory of donor fraud, that you can click through 500  
14 screens and finally maybe make a donation to a fact-checker,  
15 that donor fraud theory would not provide CHD standing. It  
16 would be -- provide standing, if to anyone, to the donors who  
17 are allegedly defrauded.

18 And, again, CHD does not claim that it was defrauded in  
19 any form or fashion because it doesn't believe any of the  
20 things that the defendants are saying.

21 The last thing I will say is that in many ways CHD's  
22 theories simply defy common sense. This is not racketeering  
23 behavior, organized crime behavior, drug cartel, the kinds of  
24 things that RICO is designed to attack.

25 What is at issue here, as we've said in multiple times and

1 is particularly important to Poynter is its speech, its  
2 journalistic right to criticize things that it believes are  
3 inaccurate and being spread on social media, in accordance with  
4 its journalistic practices and like what you will see in  
5 Exhibit B to the Second Amended Complaint.

6 So, Your Honor, we would ask that you dismiss with  
7 prejudice all the claims against Poynter and let us go home and  
8 practice journalism. Thank you.

9 **THE COURT:** You're welcome.

10 The plaintiffs.

11 **MR. TEICH:** Thank you, Your Honor. I'm going to  
12 address Section 230, the RICO fraud, Mark Zuckerberg's personal  
13 liability quickly, and then turn it over to my colleague, Jed,  
14 for a final word on Lanham Act.

15 This is, to my knowledge, the first --

16 **THE COURT:** Okay. Just a second. I'm looking at the  
17 clock, and I think you've got about 15 minutes total. That's  
18 actually generous. So you can go ahead.

19 **MR. TEICH:** Thank you.

20 First case to come to court on Facebook's responsibilities  
21 for its fact-checkers. Important case, Your Honor. First of  
22 all, though, what's not at issue? Constitutional claims,  
23 Section 230 offers no defense, just to be clear.

24 And what's not at issue is the -- on Section 230 are the  
25 warning label, the go to the CDC for reliable info, what you

1 see below not reliable.

2 Facebook published that. No fact-checker wrote that. The  
3 gray overlays that say "False information checked by  
4 independent fact-checkers," Facebook wrote that. No third  
5 party wrote that. And that's hardly neutral.

6 They're turning *Kimzey* and *Marshall's Locksmith*, the  
7 Garland case from the D.C. Circuit, on their head. Those cases  
8 involve simple, you know, transforming data points like a  
9 where's a locksmith located into a map with no representation  
10 by Google that that locksmith is actually there; or Yelp  
11 ratings into stars, no representation that, you know, it's an  
12 accurate rating.

13 Facebook's making the determination that this stuff is  
14 false and it's sticking that gray overlay on CHD's page.  
15 Facebook's the author of that.

16 The other thing that's not at issue -- excuse me, Your  
17 Honor -- on 230 is defunding the button. That's not material  
18 under Section 230 that they took down.

19 So what is at issue, though -- and it's vitally  
20 important -- is Facebook's *pay no attention to the man behind*  
21 *the curtain* defense here. It should not fly at 12(b)(6), with  
22 all due respect, Your Honor.

23 We've made these allegations about content development.  
24 The definition of an information content provider in Section  
25 230(f)(3) is an entity or person responsible in whole or in

1 part for the creation or development of the information.

2 Involved in part in the development is the -- is the standard  
3 you're going to hold us to.

4 Here's what we've alleged: That Facebook or, in fact, the  
5 CDC with Facebook, direct content to the fact-checkers  
6 prejudged as false by their algorithms. Essentially, that they  
7 tell the fact-checker this is false, you tell us why or, you  
8 know, you come up with a strawman argument why. That's our  
9 allegation.

10 And the answer they provided is this blurb they created  
11 about their apparatus, that these are independent third parties  
12 and that they select material which may be false. But you'd  
13 have to believe that that's all they're doing, giving them a  
14 great deal of material to sift through.

15 What we're alleging is, if CHD's content runs afoul of  
16 this circular definition of misinformation because it runs  
17 counter to CDC pronouncements or uses terms like  
18 "unvaccinated," that it is prejudged as false by Facebook  
19 itself.

20 Facebook pays, trains, supervises, and excludes opinion.  
21 And that's important because other stuff gets a free pass from  
22 Facebook. Like, climate change scepticism is not fact-checked  
23 because it's opinion.

24 We allege Facebook is telling the fact-checkers, "Whatever  
25 you do, don't let this go, because it's opinion. You're going

1 to find it false fact." And if that is the case, as is  
2 alleged, Facebook does not have Section 230 immunity.

3 Facebook tells the users that its fact-checkers are  
4 trustworthy. So Facebook is vouching for its agents.

5 And, of course, Facebook retains the right of control.  
6 That's the point of agency. Whether or not it's exercised,  
7 Facebook has the right of control. And there's no surer  
8 evidence of that, Your Honor, than the bottom line here.

9 Facebook is posting the fact-checker content not on  
10 fact-checker websites but on CHD's page. So it's Facebook  
11 who's pressing, you know, *submit* or *send* on that, not a  
12 fact-checker.

13 So, you know, I think in all those ways we've alleged  
14 agency, which makes Facebook at least responsible in part for  
15 the creation or development of this content.

16 I want to turn briefly to Mark Zuckerberg. Of course,  
17 he's the founder, CEO, chairman of the board, majority  
18 shareholder. But that's true in all the cases, and that's not  
19 the basis of these specific allegations.

20 What we're saying here is, he's the public face of  
21 Facebook on this issue of vaccine misinformation. He's  
22 testified to Congress multiple times on that issue. In answer  
23 to Congressman Posey's question, he testified under oath: "The  
24 science is clear. Vaccines are safe for everyone, and all  
25 vaccines." So he's taken a stand on this issue.

1       There's a reason why Representative Schiff communicated  
2 with him personally as the control person responsible for this  
3 issue, and we allege that they met to discuss this issue.

4 He -- it's undisputed that Mark Zuckerberg has been personally  
5 involved in other Facebook censorship decisions, like letting  
6 climate change skeptics get a pass for opinion.

7       This one involves prominent public figures; Mr. Kennedy,  
8 Representative Schiff, and others. It involves scientific  
9 issues like vaccines and 5G, about which Zuckerman --  
10 Zuckerberg has, you know, taken a deep personal interest.

11       And it's inconceivable to us that Zuckerberg, having been  
12 directly involved in those other categories of content  
13 regulation, is not personally involved here.

14       And then there is a panoply of personal motives that point  
15 toward his involvement, including his own heavy investment in  
16 vaccine development. I mean, we're talking, like, billions of  
17 dollars in his related for-profit entities, et cetera.

18       On the RICO fraud, it is true that the RICO fraud requires  
19 the intent to deceive and to cheat. Doesn't require that it be  
20 successful, but it does require that intent. And we do allege  
21 that there is that intent to divert viewers and users to rival  
22 nonprofits.

23       Nonprofits -- the law is clear, nonprofits do play in a  
24 commercial game in that they compete for donations. And to  
25 that extent, CHD has suffered real losses. They had 60,000 in



1 donations on the *Donate* button in the year 2019, until it was  
2 terminated.

3 And so like *Resolute Forest* out of this district, if  
4 plaintiff's customers relied on defendants' statements in a way  
5 that caused plaintiff to lose money, there's RICO standing. So  
6 that's the standing issue.

7 And the intent wraps up the sort of congruence of the  
8 deception and the cheating. And we say that's met by deceiving  
9 viewers to click elsewhere.

10 I think that I will leave it at that and turn it over to  
11 my colleague, Jed, for comments on the Lanham Act, unless Your  
12 Honor has questions.

13 **THE COURT:** Thank you, no.

14 **MR. TEICH:** Thank you.

15 **THE COURT:** You're welcome.

16 **MR. RUBENFELD:** Thank you, Your Honor.

17 Briefly, defendants, once again before Your Honor,  
18 emphasized over and over that we were not alleging specific  
19 governmental intervention with respect to the specific action  
20 of, you know, restricting plaintiff's content.

21 But defendants simply are not coming to grips with the  
22 *Mathis* case out of the Ninth Circuit that rejected that  
23 requirement and said it's a matter of standards of decision  
24 regardless of whether there is particular involvement with the  
25 particular plaintiff.

1       Second, I mentioned the Pelosi statement as satisfying the  
2       *Hammerhead* test. You'll notice that defendants just simply  
3       didn't come to grips with that; a statement that surely can be  
4       reasonably interpreted as insinuating a threat of governmental  
5       action.

6       Finally, with respect to the Lanham Act, Your Honor,  
7       defendants are just making two arguments, so I'll briefly just  
8       mention both.

9       First, they say we lack standing. And what they argued in  
10      their brief was, we weren't -- CHD is not a direct competitor  
11      with Facebook and, therefore, we don't satisfy the direct  
12      business competition requirement. They cited a 2013 case from  
13      this district saying so.

14      Unfortunately, they neglected to mention to Your Honor  
15      that in 2014 the United States Supreme Court decided *Lexmark*,  
16      expressly rejecting that standing requirement.

17      All *Lexmark* requires is zone of interests. And there are  
18      a dozen cases holding that nonprofit organizations, when  
19      defendant promotes the services of a rival nonprofit and  
20      plaintiff loses money, which is just what happened here, that's  
21      within the zone of interests of the Lanham Act, and the  
22      nonprofit can state a claim.

23               **THE COURT:** And who's the competing nonprofit?

24               **MR. RUBENFELD:** So Facebook's fact-checkers are  
25      nonprofit organizations, as we allege. Facebook promoted them.

1           And, by the way, they offer competing services; that is,  
2           they purport to offer accurate health information on the very  
3           topics that CHD does. Facebook promoted their services. They  
4           called them accurate, reliable. They directed users to their  
5           sites where users will see prominently displayed a *Donate*  
6           button.

7           So they promoted their services, and there are a dozen  
8           cases holding, Your Honor, that, you know, even if it seems  
9           counterintuitive with respect to the Lanham Act and commercial  
10          transactions, that that -- promoting a rival nonprofit's  
11          services is the proposal of a commercial transaction for Lanham  
12          Act purposes. That's the *Valley Forge* case, 24 F.Supp.3d 451.

13          With respect to the commercial speech, defendants just  
14          don't come to grips with *Arrix*, decided just two months ago by  
15          the Ninth Circuit, the Ninth Circuit's most thorough, most  
16          recent decision on the commercial speech requirement.

17          The Ninth Circuit says, on the contrary, commercial speech  
18          does not have to solely propose a commercial transaction. It's  
19          fact based. And the most important single ingredient is  
20          economic motivation.

21          We have alleged in detail Facebook and Zuckerberg's  
22          massive financial interest in the vaccine industry, and we have  
23          alleged that they were economically motivated. And the other  
24          factors, contrary to defendants' representations, are satisfied  
25          here too. But the most important is economic motivation. And

1 the Ninth Circuit's very clear this is a jury question, and  
2 it's a totality of the facts question.

3 Thank you, Your Honor.

4 **THE COURT:** Thank you.

5 Well done, all of you. We've come full circle on this.  
6 Thank you for the arguments. They're helpful. You also have,  
7 of course, provided me with substantial pleadings and  
8 attachments and exhibits to go over. So all of those things  
9 will be incorporated.

10 And the matter is submitted. You'll hear from me shortly.  
11 Thank you very much.

12 **MR. HOLTZBLATT:** Thank you, Your Honor.

13 **MS. MEHTA:** Thank you, Your Honor.

14 **THE COURT:** Thank you.

15 (At 12:37 p.m. the proceedings were adjourned.)  
16

17 **CERTIFICATE OF REPORTER**

18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.

20 DATE: Sunday, May 23, 2021  
21  
22  
23

24 

25 Katherine Powell Sullivan, CSR #5812, RMR, CRR  
U.S. Court Reporter